Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes

MICHAEL FINCH* WITH JEROME KASRIEL**

TABLE OF CONTENTS

I. INTRODUCTION

A constitutional complement to the supremacy of federal law in state courts is the availability of federal court review. Enforcement of federal law necessitates, at times, that federal courts correct the action of state courts.[1] Lacking such a power, the

---

* Professor of Law, Stetson University College of Law; B.A. 1975, Oberlin College; J.D. 1978, Boston University School of Law; Candidate, S.J.D. expected 1988, Harvard Law School.

** Associate, Piper, Estva, Karvonen & Lewis, B.A. 1962, University of North Carolina, Chapel Hill; M.B.A. 1970, Harvard Business School; J.D. 1987, Stetson University College of Law. The authors would like to thank Robert Batey, Mark Brown, Jeff Quisenberry, Fred Storm, and Mary Storm for their helpful comments on this article, and would like to acknowledge especially the invaluable preparatory work of Pat Diebold, Connie Evans, Veronica Richardson, Louise Petren, Sue Stinson, and Kelly Sorrentino.

1. The need for federal court corrective power was first demonstrated by the creation of the Supreme Court in article III of the Constitution, whose undisputed recognition was intended to guaranty the interpretation and enforcement of federal law by a supreme federal tribunal. *See* Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 10–13 (1948); *see generally* 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE 0.2[1] (2d ed. 1986). In its first legislative action concerning the judiciary, Congress expressly conferred power on the Supreme Court to review, by appeal, various decisions of state courts pertaining to federal law. *See* Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962).

Recognition of the corrective power of lower federal courts took principal form with the enactment of post-Civil War legislation. In particular, the Civil Rights Act of 1871, today codified in pertinent part at 42 U.S.C. § 1983 (1982), *see*

federal judiciary's oversight function would be reduced to that of admonition and example, and federal law commands could be reduced to exhortation. So it is that state court errors in applying federal law have always been correctable, in some form, by federal courts.[2]

Yet, neither Congress nor the Supreme Court has lived comfortably with the federal courts' oversight power, and the power is closely circumscribed by both legislative rule[3] and judicial doctrine.[4] For example, the principal mechanism for correction of state court errors—review by the Supreme Court—is premised on the fulfillment of numerous procedural prerequisites, and even then review is usually left within the discretion of the Court.[5] In recent decades, the Court's liberal exercise of this discretion to decline review has left countless instances of alleged state court error unconsidered by a federal court.[6]

In exceptional circumstances, Congress has extended oversight power to the lower federal courts. The most prominent example is the habeas corpus remedy, which permits lower federal courts to review collaterally the criminal sentences of state courts where there is alleged error in the application of federal law.[7] While more intrusive than appellate review by the Court, habeas review is nonetheless delimited by "fed-

---

infra text accompanying notes 345–478, and the federal habeas corpus statutes, today codified at 28 U.S.C. §§ 2241–55 (1982), *see infra* notes 7–9 and accompanying text, conferred authority on the lower federal courts to correct federal law violations by state courts distinct from the review authority of the Supreme Court. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS §§ 22A, 55 (4th ed. 1983) [hereinafter FEDERAL COURTS].

2. The earliest form of federal court correction was strictly limited to cases in which a state court either had invalidated a federal statute or had rejected a federal law challenge to the validity of state law. *See* FEDERAL COURTS, *supra* note 1, at 737. This corrective power, which could be exercised solely by the Supreme Court, has now been broadened considerably. Thus, under 28 U.S.C. § 1257, the Court's review authority encompasses state court decisions that sustain, as well as reject, the validity or supremacy of federal law; and it encompasses decisions where "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C. § 1257(3) (1982).

3. Among the statutory restrictions on Supreme Court review are: (a) the requirement that the state judgment be final, 28 U.S.C. § 1257 (1982); *see generally* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 120–39 (6th ed. 1986) [hereinafter SUPREME COURT PRACTICE]; (b) the requirement that a judgment be that of "the highest court of a State in which a decision could be had," 28 U.S.C. § 1257 (1982); and (c) the prohibition, in most instances, of the review of related state law questions. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 618 (1874); *see generally* FEDERAL COURTS, *supra* note 1, at 746–47. Review is similarly restricted by Congress' determination that the Court may decline, in most cases, the aggrieved party's request for review. *See infra* note 5.

4. Among the judicially recognized restrictions on Supreme Court review are (a) the requirement that the state decision not rest on an "adequate and independent" state ground, *see* Michigan v. Long, 463 U.S. 1032 (1983); *see generally* SUPREME COURT PRACTICE, *supra* note 3, at 168–85; and (b) the requirement that the federal issue supporting Court review has been timely and properly presented to the state court. *See, e.g.*, Cardinale v. Louisiana, 394 U.S. 437 (1969); *see generally* SUPREME COURT PRACTICE, *supra* note 3, at 144–68. *See also id.* at 706–21 (discussing various restrictions pertaining to the justiciability of cases).

5. Except where a state court has invalidated a federal treaty or statute, or has rejected a federal challenge to the validity of a state statute, review by the Court must be sought by writ of certiorari—which the Court may refuse to issue with or without explanation. The Court usually chooses to act without explanation. *See* SUPREME COURT PRACTICE, *supra* note 3, at 264–67.

6. By way of illustration, in its 1985 Term the Court granted review in 11.2% of all "paid" cases and 1.3% of cases filed in forma pauperis. *See* Note, *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 308 (1986); *see generally* Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 615 (1972). Many of the petitions for writ of certiorari, of course, come from the lower federal courts.

7. *See* 28 U.S.C. §§ 2241–55 (1982). Since 1968, the number of habeas corpus petitions filed by state prisoners has regularly exceeded 7,000 per year. *See* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4261, at 601–02 (1978) [hereinafter FEDERAL PRACTICE AND PROCEDURE].

eralism" safeguards: federal claimants must exhaust available state remedies,[8] and federal courts must presume correct the factual findings made by state courts.[9]

There is no counterpart to general federal habeas relief when challenge is made to state civil proceedings.[10] Such opportunities for lower federal court oversight that exist arise in the relatively limited situation where the state court proceeding, *by its very occurrence*, violates federal law. One form of such proceedings is state litigation that threatens the federal courts' own exercise of jurisdiction over a dispute. Thus, state litigation that impermissibly overlaps with federal bankruptcy proceedings,[11] with federal interpleader actions,[12] and with actions removed to federal court can be halted by federal court injunction.[13] A second situation where lower federal court oversight is possible occurs when the state proceeding is itself violative of substantive federal law. An historical example is the case of *Mitchum v. Foster*,[14] where the defendant to a state nuisance action attempting to close his bookstore succeeded in obtaining a federal injunction of the proceeding on first amendment grounds.[15]

---

8. *See* 28 U.S.C. § 2254(b) (1982). *See generally* 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4264, at 625.

9. *See* 28 U.S.C. § 2254(d) (1982). *See generally* 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4265, at 657.

10. The requirement that the habeas petitioner be "in custody" precludes use of the writ to examine conventional civil proceedings. *See* 28 U.S.C. § 2254(a) (1982). Moreover, use of the writ in *child custody* proceedings, which are civil in nature, has been recently foreclosed by the Court—at least in situations where a state court has finally adjudged the matter of child custody. *See* Lehman v. Lycoming County Children's Serv., 458 U.S. 502 (1982). Habeas relief from state custody orders has been specifically denied when asserted in connection with a claim under the Parental Kidnapping Prevention Act (PKPA). *See* Hickey v. Baxter, 800 F.2d 430, 431 (4th Cir. 1986).

11. *See* 11 U.S.C. §§ 105, 362 (1982); Diners Club Inc. v. Bumb, 421 F.2d 396 (9th Cir. 1970).

12. *See* 28 U.S.C. § 1335 (1982); Mitchum v. Foster, 407 U.S. 225, 234 (1972).

13. *See* 28 U.S.C. § 1446(e) (1982); Mitchum v. Foster, 407 U.S. 225, 234 (1972). *See also infra* text accompanying notes 443–44 (federal court may enjoin a state court proceeding which would require the relitigation of matters previously adjudged by the federal court).

14. 407 U.S. 225 (1972).

15. At the outset of this Article, it is helpful to distinguish between a proceeding that "is itself violative of substantive federal law," and a proceeding that merely raises federal law issues. For example, any civil suit in which the defendant raises a federal defense to liability or relief, or challenges the sufficiency of the plaintiff's federal claim, might be deemed in some sense "violative" of federal law to the extent that the defendant is correct. Such defenses, however, do not typically present challenges to the maintenance of the civil litigation per se. A tacit assumption of the civil litigatory system is that a private plaintiff may invoke judicial processes to test the merits of his claim; and such checks on the exercise of this power that exist take the form of costs and attorneys' fees sanctions, or, in instances of bad faith prosecution by the plaintiff, common law actions for malicious prosecution and abuse of process. Otherwise, most civil litigation pursued in good faith by the plaintiff—even if the plaintiff is mistaken in his claim—is not itself violative of legal policy.

A proceeding may be "violative" of federal law, however, when the proceeding itself or some aspect of it compromises the defendant's federal rights. For example, if judicial personnel take some positive action against the defendant as an aspect of the judicial proceeding—like attaching the defendant's property or preliminarily enjoining the defendant's activity—this procedural action may violate federal law. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987) (attachment of judgment debtor's property); Trainor v. Hernandez, 431 U.S. 434 (1977) (pre-judgment attachment of property); Mitchum v. Foster, 407 U.S. 225 (1972) (preliminary injunction of business operation).

A proceeding may also violate federal law in a more fundamental way: The very maintenance of the proceeding may infringe or compromise federal law protection. A classical example from criminal law is the prosecution of a defendant in violation of the fifth amendment's double jeopardy provision. *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 24.1–24.5 (1984). Similarly, a criminal prosecution of protected free speech activity may "chill" assertion of first amendment rights. *See* Younger v. Harris, 401 U.S. 37 (1971) (Douglas, J., dissenting); *see generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

Civil litigation may likewise threaten federal rights. As the Court has recognized, the very maintenance of antitrust litigation may constitute a violation of the defendant's own antitrust law protections. *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977). Another well-established example in civil litigation is a proceeding in which a party seeks to relitigate matters that have been disposed of in previous litigation. Such relitigation is prohibited by the full faith

This latter form of oversight of state civil proceedings is replete with potential federalism problems. First, federal court interference with state proceedings may run afoul of the Anti-Injunction Act[16] or its counterpart in judicial comity doctrine.[17] Both the Anti-Injunction Act and comity doctrine are implicated by any lower federal court action that would interfere with either ongoing state proceedings or their resultant judgments.[18]. Second, lower federal court action may occur at such an advanced stage in the history of the state court proceeding that problems arise under the full faith and credit statute[19] and the *Rooker-Feldman* doctrine.[20] These restrictions on federal relief—which like the Anti-Injunction Act do not apply in habeas actions[21]—may preclude the federal claimant who has lost in state court from relitigating a federal challenge in a lower federal court.

The possibilities and problems of lower federal court oversight of state civil proceedings have taken on renewed importance with Congress' 1980 enactment of the Parental Kidnapping Prevention Act (PKPA).[22] The PKPA expressly prohibits a state court from exercising its otherwise lawful jurisdiction over a child custody dispute when some other state court has retained jurisdiction over the dispute in accordance with the PKPA and state law.[23] The PKPA, designed to eliminate the interstate judicial skirmishing that exacerbates child custody conflicts, is an unequivocal command to regulated state courts to desist from either entertaining or adjudging custody litigation. But one issue has divided the federal courts since the PKPA's adoption in 1980: What relief—and particularly, what federal relief—is available when state courts disagree over which one may properly assert jurisdiction under the PKPA?[24]

---

and credit provisions of the Constitution and the Judicial Code, and may, in appropriate circumstances, be halted. *See infra* text accompanying notes 443–44. These full faith and credit protections are closely akin to the protections afforded by the Parental Kidnapping Prevention Act, which is the subject of this Article. *See infra* text accompanying notes 55–62.

16. 28 U.S.C. § 2283 (1982). *See infra* text accompanying notes 215–71.

17. *See infra* text accompanying notes 417–39.

18. *See infra* text accompanying notes 228–31.

19. 28 U.S.C. § 1738 (1982). *See infra* text accompanying notes 274–320.

20. *See infra* text accompanying notes 321–46.

21. The federal habeas corpus statutes, by their literal operation, authorize federal relief in circumvention of the provisions of the full faith and credit statute and the Anti-Injunction Act. Section 2254(d) of these statutes creates a rebuttable *presumption* of correctness for state court factual findings. 28 U.S.C. § 2254(d) (1982). This is in contrast to the normal preclusive effect of factual findings, which, under the theory of issue preclusion or collateral estoppel, are immune to challenge if state preclusion doctrine so provides. *See* FEDERAL COURTS, *supra* note 1, at 682, 688–90; *see also infra* note 276 and accompanying text.

Sections 2251 and 2255 of the habeas statutes create a major exception to the Anti-Injunction Act, *see* Mitchum v. Foster, 407 U.S. 225, 235 (1972), by expressly authorizing injunctive relief against pending state court proceedings and by authorizing the vacation or setting-aside of an offending state court judgment. 28 U.S.C. §§ 2251, 2255 (1982). The Anti-Injunction Act typically prohibits such relief. *See infra* notes 228–31 and accompanying text.

22. The PKPA contains, in addition to those provisions codified at 28 U.S.C. § 1738A (1982) and subsequently discussed in this Article, provision for an expanded federal role in locating missing parents and children, *see* 42 U.S.C. §§ 651, 653–54, 663 (1982); and provision for federal assistance in the enforcement of state criminal laws concerning parental kidnapping. *See* 18 U.S.C. § 1073 (1982). For a general discussion of the PKPA's constituent parts, see Note, Flood v. Braaten: *Federal Jurisdiction Under the Parental Kidnapping Prevention Act*, 57 U. COLO. L. REV. 117 (1985); Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. L. REV. 89 (1982).

23. *See infra* text accompanying notes 55–62.

24. Most federal courts have authorized federal relief to enforce the provisions of the PKPA. *See, e.g.*, Hickey v. Baxter, 800 F.2d 430 (4th Cir. 1986); McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); Heartfield v. Heartfield, 749 F.2d 1138 (5th Cir. 1985) (by implication); DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984); Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984); Olmo v. Olmo, 646 F. Supp. 233 (E.D.N.Y. 1986); Davis v. Davis, 638 F. Supp. 862 (N.D. Ill. 1986); Wyman v. Larner, 624 F. Supp. 240 (S.D. Ind. 1985); Martinez v.

This Article examines this issue in the following pages. In this examination, we consider two facets of the issue. First, in the absence of any express grant of remedial or jurisdictional power in the PKPA, what authority has a federal court to entertain an action seeking to correct state court error in applying the act? Second, assuming the existence of federal remedial power and jurisdiction, what statutory and doctrinal considerations limit their exercise?

Existing federal court decisions under the PKPA reveal a wholly unsatisfactory examination of these issues. Discussion has centered almost exclusively on the existence of federal remedial authority and jurisdiction under the PKPA,[25] with seeming disregard of the insurmountable statutory barriers to the exercise of such authority even if it is found.[26] At the same time, federal litigants have usually overlooked the one cause of action—a section 1983 claim—that provides any potential for overcoming those barriers.[27]

As this Article maintains in the following discussion, it is doubtful that the PKPA supports either an implied federal remedy or general federal question jurisdiction. Under the more rigorous contemporary standards for implying a federal

---

Reed, 623 F. Supp. 1050 (E.D. La. 1985); Templeton v. Witham, 595 F. Supp. 770 (S.D. Cal. 1984), *vacated*, 805 F.2d 1039 (9th Cir. 1986). However, two recent circuit court decisions have rejected both the reasoning and conclusion of earlier federal precedent. Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987); Thompson v. Thompson, 789 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987); *see also* Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982) (dictum suggesting the absence of a federal remedy); Bennett v. Bennett, 682 F.2d 1039, 1043 (D.C. Cir. 1982) (dictum suggesting the absence of a federal remedy).

The Supreme Court has agreed to review the *Thompson* decision, on writ of certiorari, during the October Term, 1987. *See* 107 S. Ct. 946 (1987). The questions presented in the case are as follows: (1) Whether an implied federal cause of action exists under the PKPA when two states exercise conflicting jurisdiction over a child custody dispute or issue conflicting decrees, and (2) Whether federal question jurisdiction exists since any claim for a right to relief under the PKPA necessarily depends upon resolution of a substantial question of federal law.

See, e.g., Amicus Curiae Brief of the Women's Legal Defense Fund and Parents Without Partners, Thompson v. Thompson, 789 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

The *Thompson* litigants have *not* raised any of the following issues: (1) is PKPA relief violative of the Anti-Injunction Act, *see infra* text accompanying notes 215–71; (2) is PKPA relief foreclosed by state preclusion rules or the *Rooker-Feldman* doctrine, *see infra* text accompanying notes 274–346; (3) is PKPA relief avaliable based on diversity of citizenship jurisdiction, *see infra* text accompanying notes 194–214; or (4) is PKPA relief available under 42 U.S.C. § 1983? *See infra* text accompanying notes 347–485. Of the defenses to PKPA relief mentioned above, only one—the *Rooker-Feldman* problem—is jurisdictional in nature and appropriate for sua sponte consideration at the appellate court level. *See* FEDERAL COURTS, *supra* note 1, at 23.

The Anti-Injunction Act defense, however, though not jurisdictional in nature, *see, e.g.*, Sovereign Camp v. O'Neill, 266 U.S. 292 (1924); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969), is one that the Court has scrupulously and vigorously enforced. *See infra* text accompanying notes 215–42. Thus, the Court might possibly choose, in light of this defense, to dismiss the writ of certiorari as improvidently granted so as to permit lower court consideration of the Act's applicability. *See* SUPREME COURT PRACTICE, *supra* note 3, at 289 (dismissal of writ when an important federal issue is not presented by the record).

25. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 694–96 (D.C. Cir. 1987) (discussing both federal question jurisdiction and the existence of a federal remedy); Thompson v. Thompson, 798 F.2d 1547, 1552–59 (9th Cir. 1986) (discussing the existence of a federal remedy); McDougald v. Jenson, 786 F.2d 1465, 1477–80 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (discussing the existence of federal question jurisdiction); Heartfield v. Heartfield, 749 F.2d 1138, 1140–41 (5th Cir. 1985) (discussing federal question jurisdiction); DiRuggiero v. Rodgers, 743 F.2d 1009, 1015 (3d Cir. 1984) (discussing federal question jurisdiction); Flood v. Braaten, 727 F.2d 303, 307–12 (3d Cir. 1984) (apparently discussing federal question jurisdiction).

The existence of a federal remedy under the PKPA and the existence of federal court jurisdiction to enforce the PKPA are, analytically, quite distinct issues. With the notable exceptions of the discussion in *Rogers* and *McDougald*, however, the lower court decisions fail to appreciate this distinction. *See infra* note 104.

26. *See infra* text accompanying notes 215–346.

27. *See infra* text accompanying notes 347–485.

cause of action, there is insufficient affirmative evidence of congressional intent to support the implication of a remedy. The federal courts that have discovered an implied remedy have done so largely in disregard of prevailing Court standards. Furthermore, the absence of such a remedy, coupled with the Court's 1986 decision in *Merrell Dow Pharmaceuticals v. Thompson*,[28] likely precludes invocation of general federal question jurisdiction even where state law provides a substitute remedy.

But even more fatal to these attempts to invoke federal jurisdiction and to obtain federal court relief are statutory limitations that subserve federalism concerns. Predominant among these federalism limitations is the Anti-Injunction Act. Regardless of whether the federal courts grant relief against custodial litigants or the state court itself, and regardless of whether relief is granted early or late in the history of state custody proceedings, federal equitable relief will run afoul of the Anti-Injunction Act.[29] Furthermore, if the would-be federal court grievant awaits the entering of an offending custody order before seeking federal relief—as have most grievants in the reported decisions[30]—either the full faith and credit clause or the emerging *Rooker-Feldman* doctrine will preclude federal relief other than review by the Supreme Court.[31]

There remains, however, an alternative federal court strategy that provides a means of circumventing the limitations referred to above. Federal relief could be premised on 42 U.S.C. section 1983,[32] which would provide the lower federal courts both remedial and jurisdictional authority. Based on recent Court interpretations of section 1983, state court violations of the PKPA are quite arguably violations of federal law under color of state law, and the fact that Congress failed to imply a remedy directly under the PKPA does not constitute sufficient evidence to negate the literal remedy of section 1983.[33] More importantly, contemporary Court precedent removes any constitutional or statutory barriers to federal injunctive relief from state judicial action. For this reason, the section 1983 remedy provides the only viable alternative to the commonly asserted grounds for federal relief, all of which suffer from disabling statutory restraints.

To take section 1983 precedent literally, however, has disquieting implications. Recognition of a section 1983 remedy to enforce the PKPA could signal an expanded use of the remedy, creating a mechanism for collateral review of state court proceedings that could be even more intrusive than habeas review. Furthermore, recognition of a section 1983 remedy would provide an alternative to the present statutory scheme for Supreme Court appellate review without the statutory and judicial restrictions that accompany such review.

---

28. 106 S. Ct. 3229 (1986). *See infra* text accompanying notes 173–93. As also discussed later, attempts to enforce the PKPA based on diversity of citizenship jurisdiction will probably be unsuccessful. *See infra* text accompanying notes 194–214.

29. *See infra* text accompanying notes 215–71.

30. *See infra* note 222.

31. *See infra* text accompanying notes 274–346.

32. 42 U.S.C § 1983 (1982); *see also infra* text accompanying notes 347–485.

33. *See infra* text accompanying notes 395–416.

Yet, this Article maintains that these concerns counsel judicial caution in administering a section 1983 remedy, rather than judicial machination in denying it altogether. According to the Court's expansive enunciation of the section 1983's meaning, it figures prominently in the federal scheme for supervision of state government in its executive, legislative, and judicial capacities. If something must be compromised in this sensitive conjunction of federal and state authority, it should not be the meaning of section 1983, the statutory centerpiece of the Reconstruction Congress.

Instead, enforcement of the PKPA through section 1983 presents an opportunity to reaffirm a trust that has been diminished by contemporary federalism dogma—a trust in the federal courts' competence to accommodate the commands of federal law and the adjudicative integrity of state courts. Invoking traditional equitable principles, the federal courts have sufficient authority to desist from incursions on federalism values. Section 1983, while presumptively available to correct the federal law violations of state courts, can be reserved for situations requiring expeditious and exceptional action by lower federal courts—situations, for example, in which a custody litigant engages in manifestly bad faith conduct or the state court has entertained custody litigation in flagrant disregard of the PKPA. In other situations the correction of state court error can be left to the workings of the state appellate processes and, if the Court sees fit, to supreme federal review. In this manner, delicate accommodations of federal and state authority can be entrusted to the lower federal courts' discretion just as they have come to be entrusted to the discretion of the Supreme Court.

II. A Brief Description of the PKPA

The Parental Kidnapping Prevention Act addresses a problem peculiarly amenable to federal resolution. The problem stems from the diffusion of child custody authority among the various states. Throughout the nation's legal history, child custody disputes have been resolved solely by the state courts, and federal courts have been disabled from adjudicating in the subject area.[34]

While exclusive state jurisdiction over a subject area is unremarkable in itself, this exclusivity has unsettling consequences when more than one state court asserts authority in a child custody dispute. In such a situation, there is the potential for multiple state proceedings and multiple conflicting state judgments. The result of this conflict may be the destruction of the stability of a familial relationship and, as experience shows, the waging of custodial war through child snatching and forum shopping.[35]

---

34. *See, e.g.*, Popovici v. Agler, 280 U.S. 379 (1930); Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1021–26 (3d Cir. 1975); *see generally* 13B Federal Practice and Procedure, *supra* note 7 § 3609, at 459.

35. *See, e.g.*, Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984):

> Every year between 25,000 and 100,000 children of broken marriages are kidnapped by a parent attempting forcibly to obtain custody over a child living with the other parent. The emotional cost of this "child

The problem of interstate judicial conflict is normally resolved by invocation of article IV of the Constitution[36] and its statutory counterpart, 28 U.S.C. section 1738.[37] When one state court has entered a final judgment, these provisions require that all other states defer to that judgment, or, in legal parlance, accord it "full faith and credit."[38] As a consequence, there should be no relitigation of a dispute resolved in an earlier state court proceeding.

Child custody orders, however, raise unique problems under the full faith and credit doctrine. These orders are, by necessity, modifiable when the best interest of the child so requires.[39] Because of the inherently provisional nature of custody orders, there is no finality in the sense that occurs with other types of judgments. Thus, a state may subsequently modify its sister state's order on the grounds that the order is not "final" within the meaning of section 1738,[40] or that, by its own terms, the order permits modification in the best interest of the child.[41]

The first response to this problem came from the states. By adopting the Uniform Child Custody Jurisdiction Act (UCCJA),[42] various states sought to self-impose a single set of standards for the exercise of custodial jurisdiction. If custody awards could not be finalized, their modification could at least be channeled to a specific jurisdiction. By this means, the potential for conflicting custody orders and the incentives for child snatching and forum shopping would be greatly reduced.

The UCCJA was only a limited success, however, and confirmed that a federal solution was needed. At the time of the PKPA's introduction, only thirty-nine states

---

snatching"—which must be borne in large measure by young persons who have already watched their parents' marriage fail and their families split asunder—is overwhelming. (footnotes omitted).

Id. at 304. *See generally* Note, Flood v. Braaten: *Federal Jurisdiction Under the Parental Kidnapping Prevention Act*, 57 U. COLO. L. REV. 117 (1985).

36. U.S. CONST. art. IV, § 1. *See infra* note 275.

37. 28 U.S.C. § 1738 (1982). *See infra* note 275.

38. *See infra* text accompanying notes 274–78.

39. *See, e.g.*, Flood v. Braaten, 727 F.2d 303, 308 (3d Cir. 1984) ("The special character of a custody decree results from the fact that it can be, and frequently is, modified if changed circumstances demonstrate that a modification would be in 'the best interests of the child.'").

40. A traditional requirement before extending full faith and credit to a judgment is that the judgment be "final." *See* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4432, at 298. Because custody judgments are subject to revision when changed circumstances alter the best interest of a child, many courts view these judgments as "nonfinal" within the meaning of the full faith and credit statute. *See, e.g.*, Hooks v. Hooks, 771 F.2d 935, 948 (6th Cir. 1985); McDougald v. Jenson, 596 F. Supp. 680, 685 (N.D. Fla. 1984), *aff'd*, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987). The Supreme Court, however, has declined to say whether full faith and credit is wholly inapplicable to child custody orders. *See, e.g.*, Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); Halvey v. Halvey, 330 U.S. 610 (1947). *See generally* Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711, 793–98 (1982) [hereinafter Coombs].

41. *See, e.g.*, Ford v. Ford, 371 U.S. 187, 193–94 (1962); Kovacs v. Brewer, 356 U.S. 604, 607 (1958); Flood v. Braaten, 727 F.2d 303, 309 (3d Cir. 1984) ("[I]nsofar as a custody decree is modifiable in the rendering state, full faith and credit principles also permit it to be modified in some other forum state.").

42. UNIFORM CHILD CUSTODY JURISDICTION ACT, (UCCJA) 9 U.L.A. 111 (1979). Prompted by the perceived need for a uniform state response, the UCCJA attempted to provide rules for interstate comity that would remedy the deficiencies of full faith and credit doctrine. *See* Commissioner's Prefatory Note, 9 U.L.A. 111, 112; *see generally* Bodenheimer, *The Rights of Children and the Crisis in Child Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953). The approach of the UCCJA, like that of the PKPA, is to identify a primary home state for the child, which state alone will usually exercise jurisdiction over the child concerning custody disputes. *See* Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 815–23 (1964).

subscribed to the UCCJA.[43] Nonsubscribing states became, in some instances, child snatcher "havens."[44] And even among the subscribing states, problems arose: not all states adopted identical versions of the UCCJA, and the law's malleable provisions generated inconsistency in interpretation and application.[45]

The PKPA, therefore, represented a federal effort to impose national uniformity in the standards for allocating state jurisdiction over disputes.[46] Patterned after the UCCJA, the PKPA essentially provides federal protection of custody orders that have been entered consistently with PKPA jurisdictional restrictions.[47] The PKPA does not affirmatively confer custody jurisdiction on state courts, nor does it prescribe federal standards for determining substantive issues of custody.[48] The states remain free to establish both their own standards for the exercise of custodial jurisdiction and their own standards for determining who will receive custody. But if a state exercises its custodial power in accordance with the PKPA, its judgment can be modified by other states only to the extent permitted by the PKPA.

Federal protection of a custody judgment is premised on the satisfaction of two statutory criteria. The first criterion requires that state law authorize the state court's assertion of custodial jurisdiction.[49] The second criterion requires that one of several

---

43. *See Parental Kidnapping Prevention Act of 1979, S. 105: Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 54 (1980) (statements of Professor Coombs, Senator Mathias) [hereinafter *Joint Hearings*].

44. *See id.* at 144–45 (statement of Professor Coombs); *see also* Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 215–19 (1981); Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 Mo. L. REV. 521, 547 (1974).

45. *See Joint Hearings, supra* note 43, at 144–45 (statement of Professor Combs).

46. *See Joint Hearings, supra* note 43, at 144–46 (statement of Professor Coombs); Parental Kidnapping Prevention Act of 1980, Pub.L. 96–611 § 7(b), 94 Stat. 3566, 3569 (1980) ("[I]t is necessary . . . to establish national standards under which the courts . . . will determine their jurisdiction to decide [child custody] disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions."); *see also* Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. L. REV. 89, 106 (1982) ("Establishing national standards for proper state child custody jurisdiction is the final means selected by Congress under the PKPA. The jurisdictional guidelines set forth in section 8(a) are virtually identical to those in the Uniform Child Custody Jurisdiction Act.") (footnote omitted).

47. The PKPA's pertinent provisions, codified at 28 U.S.C. § 1738A (1982), are structured as follows. Subsection (a) requires interstate enforcement of custody orders entered consistently with the Act's provisions. *See infra* note 55 and accompanying text. Subsection (b) sets forth *definitions* of the Act's terminology. Subsection (c) sets forth the *criteria* that a state custody order must satisfy in order to qualify for the Act's protections. *See infra* notes 49–52 and accompanying text. Subsection (d) establishes the criteria that must be satisfied if a state court is to retain *continuing* jurisdiction (*i.e.*, exclusive authority to modify its judgment) under the Act. *See infra* notes 62–63 and accompanying text. Subsection (e) generally requires that custodial contestants be given "notice and an opportunity to be heard" prior to custody adjudication. Subsection (f) establishes the criteria that must be satisfied before a second state may *modify* the earlier custody order of another state. *See infra* note 63 and accompanying text. Finally, subsection (g) prohibits any state from *entertaining* custody litigation when another state has, consistently with the Act's provisions, previously commenced litigation over the same subject matter. *See infra* notes 60–61 and accompanying text.

The most comprehensive and detailed discussion of the PKPA is to be found in Coombs, *supra* note 40.

48. The Act's legislative history makes clear that Congress repudiated any federal role in determining the substantive principles under which custody decisions are made. *See, e.g., Joint Hearings, supra* note 43, at 146 (comments of Professor Coombs):

> The provisions of S. 105 . . . display a clear recognition of the difference between questions of conflicts of jurisdiction and full faith and credit on the one hand . . . and, on the other hand, questions of substantive family law and details of procedures and practice. The bill shows the proper respect for the exclusive role of the States to make law in the latter areas.

49. 28 U.S.C. § 1738A(c) (1982) ("A child custody determination made by a court of a state is consistent with the provisions of this section only if . . . (1) such court has jurisdiction under the law of such state. . . .").

federal "conditions" exist.[50] These conditions are generally arranged in a hierarchy; thus, to qualify for federal protection the state judgment must satisfy the highest applicable condition.[51] If the state judgment does not fulfill the highest applicable condition, then jurisdiction was appropriate in some other state, and the judgment is denied federal protection.

The statutory condition that usually indicates the state with PKPA jurisdiction is that of the "home state."[52] The home state is, roughly speaking, the state where a child was living with her parent(s) for a specified period of time immediately preceeding commencement of the custody action.[53] This home state will usually be the appropriate state in which to bring a custody action that qualifies for PKPA protection. If there is no statutory home state or if other "emergency" circumstances exist, then residual statutory conditions will determine the state with PKPA jurisdiction.[54]

Assuming a judgment is entered in compliance with the PKPA, a custodian may enforce the judgment through both offensive and defensive procedures. A custodian may use the PKPA offensively by commencing action in a sister state court to enforce the previous judgment. As the PKPA indicates, "The appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another State."[55] In this respect, the PKPA accords custody orders a form

---

50. 28 U.S.C. § 1738A(c) (1982):

> A child custody determination made by a court of a State is consistent with the provisions of this section only if—
>
> . . .
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;
>
> (D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdicton is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
>
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

51. *Id.*

52. *Id.*

53. Section 1738A(b)(4) defines the home state as follows:

> "[H]ome State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period; . . .

28 U.S.C. § 1738A(b)(4) (1982).

54. With the exception of the PKPA's "continuing jurisdiction" provision, *see infra* notes 62–63, the only jurisdictional criteria that are not subsumed in the PKPA's hierarchy are the emergency criteria of section 1738A(c)(2)(C). *See supra* note 50.

55. 28 U.S.C. § 1738A(a) (1982).

of full faith and credit similar to that given other types of judgments under 28 U.S.C. section 1738.[56]

The PKPA also anticipates its use in a defensive context, and it is in this context that most of the federal litigation discussed in this Article arises. This defensive use often occurs when a parent seeks to obtain a custody judgment in one state that will conflict with a previously rendered judgment of another state.[57] The PKPA claimant, in reliance on the prior judgment, may appear in the offending court and challenge the proceeding on federal grounds.[58] Such defensive use is also similar to that permitted under 28 U.S.C. section 1738.[59]

One novel feature of the PKPA is its allocation of custodial jurisdiction in situations where there is yet no enforceable order. The PKPA provides that, "A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section . . . ."[60] Thus, upon commencement of a state custody proceeding in compliance with the PKPA, the plaintiff may challenge on federal grounds another state's subsequent commencement of a duplicative proceeding.[61] In effect, then, a party who has invoked a state's custody jurisdiction may challenge a subsequent proceeding either before or after entry of the first state's order.

The PKPA also contemplates that, upon a change in circumstances, a protected custody order may need modification. If at the time modification of an order is sought the rendering court has continuing jurisdiction under state law and the PKPA, only that court may modify its order.[62] If however, the rendering court's jurisdiction has ended either as a matter of state or federal law, another state may proceed to modify the judgment provided it has acquired jurisdiction under the PKPA.[63] Accordingly, the authority to modify will raise jurisdictional issues under the PKPA similar to those raised during the initial custody litigation.

The PKPA has acquired prominence in federal litigation when it has been invoked defensively to halt an allegedly violative state proceeding. These federal challenges almost always occur after the violative state court has rejected the PKPA

---

56. *See, e.g.*, R. CROUCH, INTERSTATE CUSTODY LITIGATION, A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT 83 (1981); S. KATZ, CHILD SNATCHING—THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 122 (1981). *But cf.* Coombs, *supra* note 40, at 849 (noting the distinction between § 1738's requirement that courts recognize, as oppose to enforce, sister state judgments).

57. *See, e.g.*, Hickey v. Baxter, 800 F.2d 430, 431 (4th Cir. 1986); McDougald v. Jenson, 786 F.2d 1465, 1469 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987).

58. *See, e.g., id.*

59. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4405, at 32.

60. 28 U.S.C. § 1738A(g) (1982).

61. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 685 (D.C. Cir. 1987); Heartfield v. Heartfield, 749 F.2d 1138, 1139–40 (5th Cir. 1985).

62. Subsections (d) and (f) work in tandem to protect a court's continuing jurisdiction. Subsection (d) provides that, "[t]he jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as [the court has jurisdiction under state law] and such state remains the residence of the child or of any contestant." Subdivision (f) provides that, "[a] court of a State may modify a determination of the custody of the same child made by a court of another State, if . . . (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination."28 U.S.C. § 1738A(d),(f) (1982).

63. The rendering court may also decline to exercise its jurisdictional power, in which case another state may modify the order. 28 U.S.C. § 1738(f)(2) (1982).

defense.[64] Indeed, the unanimous opinion of the federal courts is that such federal challenges can *only* be made after a state court has rejected the federal claim.[65] Otherwise, there is no ripened violation of federal law because the state court has not yet refused to defer to its sister state.

The fact that federal court actions to enforce the PKPA are *corrective* actions reveals the "unusual, unique"[66] nature of the action. The thrust of the federal action is to halt the violative state proceeding or to forbid the enforcement of its resulting judgment where the offending state court has already rejected the federal challenge.[67] The federalism concerns raised by this remedy are apparent. In one sense, the argued remedy can be seen as less intrusive upon federalism values, for it demands that the PKPA claimant first ask the offending state court to halt itself. But in another sense, the argued remedy can be viewed as highly intrusive, for it interrupts normal state appellate processes for correcting federal error, and it places lower federal courts in a potentially confrontational stance with state courts. The unique nature of the PKPA action, as we demonstrate in the following discussion, influences every facet of the argument for recognition and enforcement of the action.

III. Enforcement of the PKPA Through an Implied Federal Remedy

It is undisputed that the PKPA provides no express federal remedy for enforcement of its provisions.[68] The absence of an express remedy, however, does not preclude further judicial inquiry to determine whether an implied cause of action exists under the PKPA. For more than half a century, the Supreme Court has recognized implied causes of action on behalf of private parties to redress federal statutory violations otherwise lacking provisions for private relief.[69] Such implied

---

64. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 685 (D.C. Cir. 1987); Hickey v. Baxter, 800 F.2d 430, 431 (4th Cir. 1986); McDougald v. Jenson, 786 F.2d 1465, 1469 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); DiRuggiero v. Rodgers, 743 F.2d 1009, 1011–13 (3d Cir. 1984); Flood v. Braaten, 727 F.2d 303, 305–06 (3d Cir. 1984).

65. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 689 (D.C. Cir. 1987) ("Appellees do not assert—nor do any of the other circuits—that the PKPA grants authority to any federal court to take original (or removal) jurisdiction of a custody action. . . . The federal jurisdiction claimed here would arise only *after* a state court allegedly commits an error in determining that asserting jurisdiction is consistent with the PKPA . . . ."); McDougald v. Jenson, 786 F.2d 1465, 1477 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); Heartfield v. Heartfield, 749 F.2d 1138, 1143 (5th Cir. 1985); DiRuggiero v. Rodgers, 743 F.2d 1009, 1015 (3d Cir. 1984); Wyman v. Larner, 624 F. Supp. 240, 243 (S.D. Ind. 1985). The view that PKPA relief only applies in the instance of conflicting state court actions is supported by the Act's legislative history, which appears clearly to foreclose federal relief prior to the development of a conflict. *See infra* text accompanying notes 97–145.

66. *See* Rogers v. Platt, 814 F.2d 683, 689–90 (D.C. Cir. 1987). The court in *Rogers* emphasized the unusual character of PKPA relief because of its "quasi-appellate" function. As discussed below, *see infra* text accompanying notes 325–28, the reported decisions under the PKPA do usually arise in a context where federal relief appears to serve an appellate function. Any concern that PKPA relief will violate existing limitations on federal appellate jurisdiction, however, can be avoided if federal relief is sought expeditiously. *See infra* text accompanying notes 319–20, 345–46. More problematic is the fact that PKPA relief will disrupt either ongoing or concluded state custody proceedings. This problem, this Article maintains, cannot be avoided if federal relief is premised on the grounds regularly asserted in PKPA litigation. *See infra* text accompanying notes 271–72.

67. *See infra* text accompanying notes 219–24. *See also infra* text accompanying notes 215–73.

68. *See, e.g.*, Thompson v. Thompson, 798 F.2d 1547, 1552 (9th Cir. 1986); Flood v. Braaten, 727 F.2d 303, 310 (3d Cir. 1984).

69. *See* Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 Nw. U.L. Rev. 227, 228–29 (1984) [hereinafter Ashford].

remedies usually consist of claims for damages, but they may also encompass equitable requests for injunctive and declaratory relief.[70]

Whatever the form or relief sought, it must ultimately trace its source to congressional intent: "The focus of the inquiry is on whether Congress intended to create a remedy. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."[71] The federal doctrine of implied causes, stated succinctly in the previous quotation, constitutes a sharp departure from common law doctrine. At common law, courts "regarded the denial of a remedy as the exception rather than the rule."[72] Under the common law approach, followed by the Court until recent decades, "[c]ongressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was intended to protect."[73]

Since at least 1975 and its decision in *Cort v. Ash*,[74] the Court has reversed the common law presumption.[75] Federal courts must begin, instead, with the operating presumption that Congress intended no private remedy unless it expressed one in statutory language.[76] The burden thus shifts to the party who claims a remedy to prove its existence through analysis of the factors listed in *Cort v. Ash*.[77] Generally,

---

70. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982) (damages); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (equitable contract remedies and damages); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (declaratory and injunctive relief); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (damages).

71. California v. Sierra Club, 451 U.S. 287, 297 (1981) (citations omitted); *accord* Northwest Airlines v. Transport Workers, 451 U.S. 77, 91 (1981); Texas Indus. v. Radcliff Material, Inc., 451 U.S. 630, 639 (1981).

72. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374–75 (1982) (footnote omitted). *See generally* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 411–13 (1982) [hereinafter Sunstein]; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1300–02 (1982).

73. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377 (1982).

74. 422 U.S. 66 (1975).

75. There is considerable dispute as to when the Supreme Court shifted its approach to inferring causes of action. Justice Stevens traces the shift to the Court's decision in Cort v. Ash, 422 U.S. 66 (1975). *See* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377 (1982). Justice Rehnquist traces the shift to "a series of cases" following J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). And Justice Powell appears to trace the shift to the Court's decision in *Touche Ross & Co. v. Redington*. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 399 (1982) (Powell, J., dissenting). For an excellent discussion of the historical development of implied-rights doctrine, and still another view of the vintage of contemporary Court doctrine, see Ashford, *supra* note 69, at 240–74.

76. The Court's new approach to implied rights has been characterized as "a narrower focus on the strict construction of statutory language and history to determine whether sufficient explicit or implicit evidence of congressional intent to create implied liability exists to justify the judicial recognition of such liability." (footnote omitted). Ashford, *supra* note 69, at 231. According to Professor Sunstein, "[t]he Court has . . . adopted what amounts to a strong presumption against recognizing private rights of action: unless the language or history of the statute indicates an affirmative intent on the part of Congress to create such rights, the courts will not enforce them." (footnote omitted). Sunstein, *supra* note 72, at 413.

77. 422 U.S. 66 (1975). The *Cort* test is as follows:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted).

Because of the diverging opinions on the Court concerning the origins of the stricter contemporary approach, *see supra* note 75, it is not altogether clear how the *Cort* test will be applied by any particular majority. The currently

these factors address statutory language, policy and history, and the likely effect that recognition of a remedy will have on state regulatory authority.[78]

This "strict constructionist"[79] approach of the modern Court has special significance for the implication of an equitable remedy to enforce the PKPA. Under this approach, an implied remedy may not be premised on the federal courts' perception of desirable statutory policy—which is, in fact, the premise of most courts that have recognized a federal role in enforcement of the PKPA.[80] Instead, conspicuous statutory language or history is required for the federal courts to exercise an implied remedial power. That language and history, this article maintains in the following discussion, is lacking in the instance of the PKPA. Moreover, when the PKPA is examined in the context of other statutory provisions that apply when federal courts are asked to interfere with state court action, the inference is inescapable that Congress never contemplated the possible enforcement of the PKPA through proceedings in the lower federal courts.[81] And Congress' demonstrable failure to consider an implied remedy, according to current Court doctrine, is fatal to the implication effort.

A. *The Existence of Federal Rights Under the PKPA*

Under *Cort v. Ash*,[82] the threshold question in determining the existence of an implied private remedy is whether a federal statute "was enacted for the benefit of a special class of which the plaintiff is a member."[83] Alternatively stated, the question asks whether a statute creates "rights"[84] on behalf of the plaintiff's class, or merely declares the "duties"[85] of a federally regulated party. Semantics assume considerable importance under this inquiry. Thus, implied private remedies have been found most commonly where a statute explicitly confers rights on the plaintiff class. Examples include statutes that literally identify beneficiaries like "citizens," "persons,"

---

ascendent approach appears to be that of Justice Stevens. Justice Stevens has stated that, while all four *Cort* factors may be relevant in a particular case, examination of the first two factors will be dispositive if congressional intent can be "definitely" resolved. *See* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 388 (1982); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 94 n.31 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979). In any event, the burden of affirmatively demonstrating some form of congressional intent to imply a cause of action rests with the proponents of the cause. *See* Ashford, *supra* note 69, at 270–72; Sunstein *supra* note 72, at 413.

78. *See* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984).

79. *See* Ashford, *supra* note 69, at 231; *see also* Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 562 (1980).

80. *See infra* text accompanying notes 155–56.

81. *See infra* text accompanying notes 97–154.

82. 422 U.S. 66 (1975).

83. Cannon v. University of Chicago, 441 U.S. 677, 689 (1979).

84. Cort v. Ash, 422 U.S. 66, 78 (1975).

85. The Court has emphasised the importance of whether the statute creates rights or duties as follows:

> Not surprisingly, the right—or duty—creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. [With one exception] this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.
>
> . . .
>
> Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large.

Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (citations omitted).

"employees," "representatives," and "parties."[86] As observed by Justice Stevens, "a statute declarative of a civil right will almost always have to be stated in terms of the benefited class."[87]

The Court is far less willing to infer enforceable rights in statutes that merely impose requirements on a federally regulated party or forbid certain conduct by that party. Thus, statutes which proscribe certain conduct as unlawful or impose certain duties have often been construed not to create privately enforceable rights.[88] The protection of such statutes is said to extend to the "general public" and not to an "especial" class not designated in the statute.[89]

One might argue, based on existing Court precedent, that the language of the PKPA creates governmental duties but not privately enforceable rights. As noted earlier, the statute addresses state authorities and imposes on them both affirmative and negative duties.[90] The only reference to rights of custodial claimants occurs in a section of the PKPA requiring notice and a hearing opportunity prior to termination of a contestant's "parental rights."[91] There is no similar "rights" language in those statutory provisions allocating state court jurisdiction over custody disputes. Furthermore, these provisions literally speak to the "state" and its "courts," omitting any reference to the custodial claimants.[92]

The claim that the PKPA imposes no enforceable rights, however, flies in the face of good sense as well as judicial practice. As a matter of judicial practice, the PKPA claim will be invoked, if at all, by the custodial claimant. It is well established that rules regarding full faith and credit and preclusion are affirmative defenses of litigants that will ordinarily be waived if not asserted by them.[93] Nor are these rules a matter of discretionary etiquette for state courts. As the Supreme Court observed in interpreting the full faith and credit statute, "when a state court refuses credit to the judgment of a sister state . . . an asserted federal right is denied . . . ." [94]

---

86. *Id.* at 692 n.13.

87. *Id.*

88. *See id.*

89. *id.*

90. *See supra* text accompanying notes 49–62. The opinion of the D.C. Circuit in *Rogers v. Platt* suggests such a view. In rejecting an earlier court's recognition of a federal enforcement role for the PKPA, the *Rogers* court commented:

> The [earlier] court also refers to the need to provide a remedy to protect a federal right, (citation omitted) but does not define the right except as it is implicitly defined by the remedy the court fashioned: apparently a right to have state courts properly apply a federal statute, which can only be ensured by federal district court review. That seems to assume the conclusion. As we have pointed out, the PKPA was not designed to affect private or executive branch conduct, so it seems the discussion of private federal rights is out of place.

Rogers v. Platt, 814 F.2d 683, 694 n.14 (D.C. Cir. 1986).

91. *See* 28 U.S.C. § 1738A(e) (1982): "Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child."

92. *See* Thompson v. Thompson, 798 F.2d 1547, 1553 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) ("This language clearly states the duty of applying the statutory standards in determining jurisdiction is imposed upon the state courts themselves.").

93. *See* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4405, at 32 ("The fundamental premise of the requirement that preclusion be pleaded and proved is that a party entitled to demand preclusion is also entitled to waive it." (footnote omitted)). *See also* Fed. R. Civ. Proc. 8(c).

94. Lamb Enters. v. Kiroff, 399 F. Supp. 409, 412 (N.D. Ohio 1975) (citation omitted), *rev'd on other grounds*,

Moreover, the fact that the PKPA speaks to state courts in their exercise of jurisdiction should not obscure the import of PKPA protection: the PKPA constitutes a fundamental protection of custodial rights. Indeed, congressional findings accompanying the PKPA refer to the "welfare of children and their parents and other custodians," and the resultant "deprivation of rights and liberty and property without due process of law" produced by the failure of state courts to defer to custodial decisions of sister states.[95] It is now judicially settled that "parents have a liberty interest in the custody of their children"[96] under the fourteenth amendment, and it is just such liberty interest that is at stake in PKPA litigation. Thus, the PKPA is not some federal administrative scheme for conveniently allocating the jurisdiction of state courts; its "especial" beneficiaries are the children and the custodial claimants who, in accordance with the PKPA, have acquired the right to preserve a judicially created custodial relationship. Whatever its semantic vagaries, then, the PKPA is essentially a federal protection of custodial rights.

B. *Legislative Intent Regarding Enforcement of the PKPA*

The second and often determinative factor to be examined under *Cort* is the existence of evidence showing "legislative intent, explicit or implicit, either to create . . . a remedy or to deny one."[97] This factor is sufficiently general to permit a broad-ranging inquiry, drawing upon a statute's inferred meaning,[98] its recorded legislative history,[99] the "legal context" of the statute's enactment,[100] the provisions of related statutes,[101] and even the state of implied rights doctrine at the time of the statute's enactment.[102] If congressional intent can be adequately gleaned from these considerations, the Court will not "trudge through"[103] the remaining *Cort* factors.

Both the Ninth and the District of Columbia Circuits have discovered in the PKPA's language and history a congressional intent to deny federal equitable relief.[104] In support of their position, the courts have identified various indicia of this

---

549 F.2d 1052 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977); *accord* Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 443 (1943).

95. Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96-611, § 7(a)(4), 94 Stat. 3566, 3568 (1980). *See also* 28 U.S.C. § 1738A(e) (1982) (referring to "parental rights").

96. Hooks v. Hooks, 771 F.2d 935, 941 (6th Cir. 1985) (citations omitted).

97. Cort v. Ash, 422 U.S. 66, 78 (1975).

98. *See, e.g.*, Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 91-93 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-71 (1979).

99. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536-41 (1984); Cort v. Ash, 422 U.S. 66, 81-84 (1975).

100. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 379 (1982); Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979).

101. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20-21 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-72 (1979).

102. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378-82 (1982). Since the PKPA was considered and enacted during a 1980 congressional session, there can be no doubt that Congress was constructively aware of the Court's newly developed conservative approach to the implication of federal causes. *See supra* note 75 (tracing the origins of the modern approach to no later than 1979).

103. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381 (1982).

104. *See* Rogers v. Platt, 814 F.2d 683, 687-96 (D.C. Cir. 1987); Thompson v. Thompson, 798 F.2d 1547, 1551-59 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

intent. Regarding statutory language, these courts have stressed the "noncoercive" nature of PKPA phrasing, which refers to state enforcement of the PKPA's provisions and omits any reference to a federal enforcement authority.[105] Such language, according to these courts, "suggests that Congress' intent was to encourage and facilitate the cooperative resolution of interstate custody disputes, not to mandate interstate uniformity by federal court enforcement of the statute."[106]

The Ninth and District of Columbia Circuits have bolstered their interpretation of the PKPA with pertinent legislative history. That legislative history is interlaced with references to state enforcement of the PKPA and to the carefully limited federal role in regulating interstate custody disputes.[107] Beyond doubt, the PKPA was intended to nationalize standards for the exercise of custody jurisdiction by state courts and to mandate full faith and credit for state court judgments entered in

---

There is rampant confusion among the circuits about the proper approach when determining federal court authority to enforce the PKPA. Indeed, the D.C. Circuit has correctly observed that no federal circuit has explicitly viewed the issue as one of implied cause of action. *See* Rogers, v. Platt, 814 F.2d 683, 689, 694 n.13 (D.C. Cir. 1987). Most courts have discussed the issue as a *jurisdictional* one—"Did Congress confer jurisdiction on the federal courts to enforce the PKPA?"—rather than as a remedial one. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465, 1476–80 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); Heartfield v. Heartfield, 749 F.2d 1138, 1140–41 (5th Cir. 1985); Flood v. Braaten, 727 F.2d 303, 307–12 (3d Cir. 1984). *But see* Olmo v. Olmo, 646 F. Supp. 233, 236 (E.D.N.Y. 1986) (interpreting the above-listed circuit court decisions as implied-cause-of-action cases).

Two observations are important in making sense of the circuit court decisions. First, it is indisputable that the federal courts' authority to provide equitable relief when the PKPA is violated must come from *some* source. Otherwise, the federal complaint will "fail to state a claim upon which relief can be granted," *see* Fed. R. Civ. Proc. 12(b)(6), and jurisdiction will be functionally irrelevant. If the remedy comes from federal law, *i.e.*, the PKPA, then authorization must be found through analysis of the implied-rights precedent because it is well established that the implied-rights doctrine controls the inference of federal equitable, as well as monetary relief. *See supra* note 70. Therefore, the decisions of the courts in *Flood* and *Heartfield*, if they are to have analytical foundation, should probably be re-rationalized as implied-rights decisions, notwithstanding the courts' indications to the contrary. *See* Olmo v. Olmo, 646 F. Supp. 233, 236 (E.D.N.Y. 1986).

Second, if federal authority is based on the assertion of federal jurisdiction to enforce *state* remedies, as was the case in *McDougald*, then that federal authority must be scrutinized under the Court's recent decision in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 106 S. Ct. 3229 (1986). As discussed below, *Merrell Dow* focuses on one of two inquiries when general federal question jurisdiction is asserted to enforce state-created causes of action: (1) has Congress expressly or impliedly created a federal remedy to govern the same situation, and (2) are the reasons for Congress' denial of a federal remedy (if a denial is found) sufficient reasons to deny assertion of federal jurisdiction to enforce state-created remedies? *See infra* text accompanying notes 172–90.

Thus, it is not possible to discuss *any* federal court role in enforcing the PKPA without proceeding through a discussion of implied-rights doctrine. For this reason, it is not surprising that the litigants before the Supreme Court in Thompson v. Thompson 789 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987), have presented the issue of an implied cause of action *and* the issue of federal jurisdiction in their arguments to the court. *See supra* note 24. Nor is it surprising that the decisions discussed in the text—notwithstanding their flawed doctrinal foundations—seem to address largely the same concerns that must be addressed under the implied-rights doctrine. As the D.C. Circuit observed in *Rogers* after discussing the language and legislative history of the PKPA, "[o]ur conclusion applies whether Appellee's claim is characterized as a federal cause of action or as a state custody action dependent on federal law." Rogers v. Platt, 814 F.2d 683, 696 (D.C. Cir. 1987). In order to provide some order to what is otherwise a methodological morass, we shall structure the discussion in this section according to the appropriate doctrinal categories.

105. *See* Rogers v. Platt, 814 F.2d 683, 693 (D.C. Cir. 1987); Thompson v. Thompson, 798 F.2d 1547, 1552–53 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

106. Rogers v. Platt, 814 F.2d 683, 693 (D.C. Cir. 1987).

107. *See, e.g.*, *Joint Hearings*, *supra* note 43, at 6–7 (comments of Senator Wallop), 20 (comments of Congressman Duncan), 134, 146–49 (comments of Professor Coombs). These comments, it should be emphasized, are not directed to the federal *judiciary*'s role, as such, but reflect instead a general concern with the intrusion of substantive *legislative* regulation of the subject area of domestic relations.

accordance with the PKPA's jurisdictional provisions.[108] Nothing in the discussion of this scheme recognizes a federal enforcement role.

In fact, the few references to a federal court role in enforcing the PKPA appear to directly negate such a role. One reference, a letter to the congressional committee from then Assistant Attorney General Patricia Wald, expressly argued against the recognition of federal court authority to enforce the PKPA.[109] This position was founded, in part, on the Justice Department's concern that federal authority would "increase the workload of the federal courts" and would demand of them an expertise only to be found in state courts accustomed to the adjudication of custody disputes.[110] The Department's position was also founded on its belief—quite mistaken, as a later Supreme Court decision would reveal[111]—that Congress lacks constitutional authority to confer federal court jurisdiction to enforce state-created rights.[112]

---

108. The legislative history on this point is comprehensively gathered in the decision of Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

109. The letter states in part:

> We are also concerned about approaches which would increase the workload of the federal courts. The increasing pressure of criminal prosecutions has resulted, in many federal districts, in extensive delays in important civil proceedings. Furthermore, as noted previously, the state courts have developed an expertise in domestic relations matters which is totally lacking in the federal courts.
>
> Apart from these practical problems with the federal forum approach, there is some question as to the constitutional basis for Congress' power to enact bills such as H.R. 9913. While Article III of the Constitution sets forth nine categories of cases over which the federal courts may exercise judicial power when authorized by Congress, we believe that only two—diversity of citizenship and federal question jurisdiction—are arguably relevant here. However, we question whether support for these bills can be found in diversity jurisdiction, since the proposals are not limited to granting jurisdiction to "citizens." Nor does the legislation establish a federal substantive law—it would give the district courts jurisdiction to enforce the custody orders of state courts and the law which will be applied is purely *state* law—and, accordingly, federal question jurisdiction likewise may not lie. Finally, we doubt that the Full Faith and Credit Clause (Art. IV, Sec. 1) would itself provide a source of Congressional power sufficient to sustain these proposals. Thus, we are unable to support this proposed solution to the "child snatching" dilemma.

Joint Hearings, supra note 43, at 104.

Although statements at congressional committee hearings are used by the federal courts when interpreting legislation, their probative value is highly variable. This is particularly the case when the statement is made by someone other than a member of Congress. *See* 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.10 (4th ed. 1984).

110. *See Joint Hearings, supra* note 107.

111. The Justice Department's position, as reflected in the Wald letter, is that federal question jurisdiction is suspect when state law provides the substantive rules of decision—as it does in child custody disputes. *See supra* text accompanying notes 43–48. This view was subsequently undermined in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). In *Verlinden*, the Court upheld the power of Congress to confer federal court jurisdiction over state tort law suits against foreign nations under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (1976). *Id.* According to the Court, Congress' article I power to regulate the conditions of foreign sovereign immunity sufficiently federalized the case to justify its conferral of article III jurisdiction on the federal courts. *Id.* at 493. Because the non-existence of sovereign immunity under federal law is a necessary prerequisite to the assertion of a state tort claim, the Court found the jurisdictional grant to be within the "arising under" jurisdictional provisions of article III. *Id.* at 493–97.

The *Verlinden* holding provides a direct analogue to suits involving the PKPA. Congress undoubtedly has the authority, under Article IV of the Constitution, to prescribe the conditions for interstate enforcement of child custody orders. *See* Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 827 (1964). In the PKPA, Congress has exercised that authority to regulate state custody proceedings that may interfere with the custodial authority of other states. *See Joint Hearings, supra* note 43, at 150–51 (statement of Professor Coombs). Therefore, a necessary ingredient of custodial adjudication in the interstate setting is the validity of such adjudication under the PKPA—even if state domestic relations law provides the substantive rules for determining the underlying issue of custody. *See infra* text accompanying notes 168–72. For this reason, resolution of interstate custody disputes is premised on the satisfaction of federal law requirements much as state tort litigation in *Verlinden* was premised on the satisfaction of federal immunity law. Thus, *Verlinden* clearly suggests that the position of the Justice Department is mistaken.

112. *See infra* text accompanying notes 164–67.

A second reference in the legislative history has been interpreted as even more telling than the opinion of the Justice Department. In 1979, Congressman Fish introduced a bill that would have given the federal courts diversity jurisdiction to enforce state custody orders. This bill, ultimately rejected by Congress, would have given the federal courts jurisdiction to enforce state court orders *before* an interstate court dispute had arisen.[113] During a brief colloquy between Congressman Fish and Congressman Conyers, the proponent of a bill that would eventually take form in the PKPA, Congressman Conyers cited in his opposition to the Fish proposal the same reasons raised by the Justice Department in its opposition to a federal court enforcement role.[114]

Close scrutiny of the reasoning of the Ninth and District of Columbia Circuits suggests that these courts, while making appropriate reference to statutory language and history, somewhat exaggerate their value as evidence of congressional intent concerning a federal court enforcement role. First, the failure of Congress to express a federal enforcement role in the PKPA adds nothing per se to the claim that Congress rejected such a role. An implied right of action will, by its nature, derive from sources other than the plain language of the statute.[115] Nor is the fact that the PKPA is addressed to the states necessarily a ground for inferring that the states alone are to enforce the act. Such an argument would be based on a crude analogy to Supreme Court precedent in which the existence of one federal remedy is deemed an implied

---

113. The bill, offered as an amendment to 28 U.S.C. § 1332 (1982) (the "diversity of citizenship" jurisdictional statute) provided:

> Each district court of the United States shall have jurisdiction under this section of any civil action brought by a parent or legal guardian of a child for enforcement of a custody order against a parent of the child who, in contravention of the terms of the custody order, has taken a child to a state other than the state in which the custody order was issued.

H.R. 9913, 95th Cong., 1st Sess. (1977); H.R. 11273, 95th Cong., 2d Sess. (1978).

114. The discussion between Congressmen Conyers and Fish proceeded as follows:

> MR. CONYERS. Could I just interject, the difference between the Bennett proposal and yours: You would have, enforcing the full faith and credit provision, the parties removed to a Federal court. Under the Bennett provision, his bill would impose the full faith and credit enforcement on the State court.
>
> It seems to me that that is a very important difference. The Federal jurisdiction, could it not, Mr. Fish, result in the Federal court litigating between two State court decrees; whereas, in an alternative method previously suggested, we would be imposing the responsibility of the enforcement upon the State court, and thereby reducing, it seems to me, the amount of litigation.
>
> Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?
>
> MR. FISH. Well, I really think that it is easier on the parent that has custody of the child to go to the nearest Federal district court . . . .
>
> MR. CONYERS. Of course you know that the Federal courts have no experience in these kinds of matters, and they would be moving into this other area. I am just thinking of the fact that they have "speedy trial" considerations, antitrust, organized crime, the RICO statute, bankruptcy matters, and here on the average of a 21-month docket, you would now be imposing custody matters which it seems might be handled in the courts that normally handle that . . . .
>
> MR. FISH. I am fully aware . . . that it will add a burden to the Federal court system.

Parental Kidnapping: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary, House of Representatives on H.R. 1290, 96th Cong., 2d Sess. 14 (1980) [hereinafter *House Hearings*].

115. The absence of such language, admittedly, creates a presumption that Congress intended no remedy, which presumption the remedial proponent must overcome. *See supra* text accompanying notes 74–77. But, once the burden of proof is established, continued reference to the absence of explicit remedial language seems to beg the question. *Cf.* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 94 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979).

exclusion of other remedies.[116] Yet, in the past, this precedent has typically been applied in situations where at least some alternative *federal* remedy was preserved by the pertinent federal statute.[117] The Court has not extended the doctrine of implied exclusion on behalf of state-created remedies. It should also be recalled that proponents of an implied remedy under the PKPA seek *corrective* action in the situation where the state remedy—assertion of a PKPA defense in state court—has proven ineffectual.[118] In this situation, where the state court rejects a PKPA challenge and continues with the offensive proceeding, the PKPA's mechanism for self-enforcement by the state has arguably played itself out.[119]

Thus, the language of the PKPA is at most ambiguous concerning the appropriate role for federal courts. Less equivocal is the PKPA's legislative history. That history, as noted by the Ninth and District of Columbia Circuits, clearly suggests that Congress considered and rejected a federal court role for interstate enforcement of custody orders.[120] In rejecting the Fish bill, Congress denied federal courts the jurisdiction, in diversity of citizenship cases, to enforce custody orders in the "first instance."[121] That is, Congress denied federal courts the jurisdiction to affirmatively enforce custody orders apart from the eruption of an interstate conflict between state judicial authorities. And, while it is true that the rejected bill called for first instance jurisdiction, its rejection may suggest Congress' implicit intent regarding corrective jurisdiction.

Three policy arguments were raised in opposition to federal jurisdiction to enforce state custody decrees in the first instance. First, there was concern with the imposition of a greater workload on the lower federal courts.[122] Second, there was concern with the possible incursion of federal courts into an area—domestic relations—traditionally regulated by state courts.[123] Third, there was a related

---

116. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19–20 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court may be chary of reading others into it."); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 93–94 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 572–58 (1979); Cort v. Ash, 422 U.S. 66 (1975); National R.R. Passenger v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

117. *See, e.g., id.*

118. *See supra* text accompanying notes 64–67, *infra* text accompanying notes, 274–83.

119. One might contend, of course, that state self-enforcement entails the use of state *appellate* remedies. In some situations, however, the passage of time occurring before appellate action may have important consequences for the custodial relationship. As argued in one amicus curiae brief filed in *Thompson*, "The prolonged litigation over custody that would arise from virtual impasse cases would place children in a 'custody limbo.' Numerous psychological studies have confirmed that at all stages of development children require stabiliy and continuity in their living arrangements." Amicus Curiae Brief of the Women's Legal Defense Fund & Parents Without Partners, at 10 n.11, Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987). The amicus brief also points out that, upon passage of considerable time, the parent actually retaining custody may obtain a litigatory advantage in asserting his substantive claim for custody. *See id.* at 9–10 n.10.

120. *See* Rogers v. Platt, 814 F.2d 683, 692–94 (D.C. Cir. 1987); Thompson v. Thompson, 798 F.2d 1547, 1554–58 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

121. *See supra* notes 113–14. *See also* 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.18 (4th ed. 1984) ("Generally the rejection of an amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment."(footnote omitted)). *See,e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 22 (1979) (deletion of jurisdiction reference in bill "is one more piece of evidence that Congress did not intend to authorize a cause of action . . . ."); *accord* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 539 (1984).

122. *See supra* notes 109, 114.

123. *See supra* notes 109, 114.

apprehension that federal courts lacked expertise to address adequately those issues that might arise under the PKPA.[124]

These policy contentions apply, with varying degree, whether the issue is one of first instance or corrective jurisdiction. As for the federal courts' workload, corrective jurisdiction would obviously have an impact, though a lesser one than that resulting from first-instance jurisdiction. This lessened impact would result from the state courts' presumed ability and willingness to enforce the PKPA, which would reduce the need for corrective federal action.[125] Just how many cases would be screened from the federal courts, however, is impossible to determine. Nor is it possible to determine whether the diminution in the federal caseload would be sufficient to mollify Congress' apparent concern.

Congress' concern with the respective expertise of state and federal courts, on the other hand, would apply equally to first-instance and corrective jurisdiction. In both cases, the adjudicatory task is the same—usually determining whether one state's custody order is immune from modification by another court.[126] The principal difference between first instance and corrective jurisdiction is that, in the latter situation, federal courts are usually reexamining an issue previously examined by a state court.[127] But in both instances, the same question of relative expertise is posed.

Yet, it is worthwhile to consider whether the asserted congressional interest in domestic relations expertise *is* a legitimate concern in challenges under the PKPA. This claim of expertise, as expressed in the legislative history and judicial opinion, focuses on the traditionally exclusive province of state courts to adjudicate domestic relations disputes, particularly those involving child custody.[128] Even though the PKPA regulates state court jurisdiction, and not the substantive rules for resolving disputes as such, some of its jurisdictional criteria could arguably enmesh the federal courts in substantive custody questions. For example, determination of a state's jurisdiction could turn on proof that a child has been abandoned or is otherwise in need of physical protection,[129] or could turn on judicial estimation of the child's

124. *See supra* notes 109, 114.

125. That an appreciable amount of screening occurs is confirmed by reported state decisions. *See infra* notes 479–80.

126. Most reported federal cases under the PKPA involve challenges to proceedings that would alter another state court's prior custody order. *See infra* note 222.

127. *See infra* note 222.

128. *See supra* notes 109, 114. The contemporary justifications for this historical limitation on federal jurisdiction have been described as (1) the need for informed, local discretion in awarding child custody, (2) the need for state law expertise in adjudicating custody, (3) the need for supportive service in supervising family relations, and (4) the need for continuing supervision by the court deciding custody. *See* DiRuggiero v. Rodgers, 743 F.2d 1009, 1019–20 (3d Cir. 1984); *accord* Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982). Because PKPA relief can be limited to a simple declaration of the validity of one state's custody order, *see, e.g.*, McDougald v. Jenson, 786 F.2d 1465, 1481 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); DiRuggiero v. Rodgers, 743 F.2d 1009, 1014 (3d Cir. 1984), there are no supervisory problems raised by the granting of relief. *See* DiRuggiero, v. Rodgers, 743 F.2d 1009, 1020 (3d Cir. 1984). Thus, if the domestic relations exception has any application to PKPA litigation, it must result from the nature of the legal issues raised under the PKPA.

129. 28 U.S.C. § 1738A(c)(2)(C) (1982).

best interest.[130] For these reasons, the Ninth and District of Columbia Circuits were wary of authorizing federal court relief under the PKPA.[131]

A closer examination of the PKPA, however, casts doubt on the claim that traditional domestic relations issues are truly implicated in litigation concerning custodial jurisdiction. To begin with, the PKPA establishes a *hierarchy* of jurisdictional grounds, the pinnacle of which is the home state of the child.[132] Generally, the question of jurisdiction will be settled by identification of the home state, and this identification depends on the determination of factual issues like the physical residence of the child.[133] These factual issues will not foist upon the court any policy-related problems that require expertise in domestic relations law.

Even if the home state determination does not resolve the jurisdictional problem, the subsidiary grounds for resolution are not pervaded by policy concerns. These subsidiary jurisdictional grounds, for example, focus on whether the parties have a "significant connection" with a state and whether "substantial evidence" about the dispute is located in the state;[134] whether the child has been abandoned or abused;[135] and *lastly*, whether "it is in the best interest of the child that [a] court assume jurisdiction."[136] Most of these grounds depend, again, on the resolution of factual questions that require no domestic relations expertise. Moreover, the jurisdictional ground relating to the child's best interest is an emergency, last resort consideration that is "to be applied only rarely."[137]

Thus, to the extent that legislative history reflects a sensitivity to state authority in domestic relations matters, the sensitivity is not well founded. This may suggest that such a concern cannot fairly be attributed to Congress and should, instead, be viewed as errant, argumentative commentary by jurisdictional opponents.[138] If this view is correct, the most plausible intent attributable to Congress in rejecting jurisdictional proposals is that Congress was simply presented with insufficient

---

130. 28 U.S.C. § 1738A(c)(2)(D) (1982).

131. *See* Rogers v. Platt, 814 F.2d 683, 693 (D.C. Cir. 1987) ("[F]ederal judges cannot normally referee between competing state court interpretations of the PKPA in an antiseptic procedural fashion. More likely, they will be obliged to consider the 'best interest of the child,' and that task, from all indications, is not one Congress wished to entrust to federal judges."); Thompson v. Thompson, 798 F.2d 1547, 1558–59 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (referring to the emergency provisions of 28 U.S.C. § 1738A(c)(2)(C) (1982)).

132. *See supra* text accompanying notes 49–56.

133. *See supra* note 53.

134. 28 U.S.C. § 1738A(c)(2)(B) (1982).

135. 28 U.S.C. § 1738A(c)(2)(C) (1982).

136. 28 U.S.C. § 1738A(c)(2)(D) (1982).

137. *See Joint Hearings*, *supra* note 43, at 150 (comments of Professor Coombs). Indeed, Professor Coombs cites the emergency provisions of the PKPA as evidence that the Act does *not* impose federal law regulation on the conduct or fitness of custodians, in contrast to some proposed amendments to the PKPA that would have "federalize[d]" the substantive law of child custody. *See id.* Furthermore, to the extent that a federal court is asked to review a state custody order based on the best interest jurisdictional criterion, the federal court can simply (1) determine whether another state court has jurisdiction based on one of the superseding grounds for PKPA jurisdiction—in which case the best interest ground becomes moot; or (2) if the child's best interest is determinative, review the state court's finding on this point and accord it deference unless it is clearly mistaken.

138. It is also worthwhile to observe that the legislative commentary is not that of the PKPA's draftsmen or sponsors, and is not contained in a formal congressional report. *See generally* 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 48.06, 48.10 (4th ed. 1984). Moreover, the colloquy between Congressmen Conyers and Fish, *see supra* note 114, is hardly the best evidence of congressional intent concerning a bill that never received plenary consideration by Congress. *See generally id.* at §§ 48.10, 48.13. (4th ed. 1984).

justification for adding PKPA litigation to the federal courts' workload.[139] Thus, only to the extent that a corrective PKPA action would appreciably burden the federal docket can legislative history be construed as a disapproval of that action.

Another criterion used by the Supreme Court in discerning congressional intent is the "legal context" of the enactment.[140] Most often, the legal context directs the Court to examine judicial precedent at the time of a law's enactment, so as to determine whether Congress acted in response to that precedent. Congress might, for example, enact a statute with the knowledge that its predecessor statute, or related legislation, had been interpreted to imply a private cause of action.[141] In this context, Congress might be said to have tacitly signaled the courts to infer a similar remedy for its current enactment.

According to some courts, the legal context of the PKPA can be found in judicial interpretation of its companion statute, 28 U.S.C. section 1738. As stated by the Ninth Circuit:

> With a single exception . . . no court has held [that] section 1738 authorized private suit in federal district court to require a state court to give full faith and credit to the judgment of a court of another state. It seems highly unlikely Congress would follow the pattern of . . . section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under . . . section 1738.[142]

Contrary to the position of the Ninth Circuit, section 1738 precedent does not evidence a legal context negating an implied remedy under the PKPA. First, that precedent does not involve attempts to find an implied remedy under section 1738; rather, these cases reject federal court authority to enforce section 1738 on the basis of other, jurisdictional grounds.[143] More important, these cases do not address the

---

139. One other congressional statement, made by the sponsor of a companion version of the PKPA, does seem to confirm the rejection of one form of *first instance* federal jurisdiction. In hearings before a House subcommittee, Congressman Bennett commented:

> I do not envision this being anything in the Federal court's handling at all. I envision that being just as it is now, a matter which would be considered by the court which fixed the custody in the first place, or which might amend it in the second place, and it would not be a Federal court; it would be a local court having jurisdiction over the domestic problems.

See House Hearings, *supra* note 114, at 7. Congressman Bennett's statement (though rather opaque) seems to refer to an action seeking either to determine custody *initially* or to *modify* an earlier custody judgment—situations where authority under the PKPA would present a threshold question. Without question, federal courts were not intended to exercise initial custody or modification jurisdiction, and any such attempt would directly violate the concerns behind the domestic relations prohibition. *See supra* text accompanying notes 127–36. Again, however, this prohibition does not directly apply in instances of federal jurisdiction seeking to correct state court errors.

140. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 379 (1982); Cannon v. University of Chicago, 441 U.S. 677, 698–99 (1979).

141. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v.Curran, 456 U.S. 353, 378–79 (1982) ("When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts . . . the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy."); Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).

142. Thompson v. Thompson, 798 F.2d 1547, 1555–56 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (footnote omitted).

143. In the principal cases denying federal relief to enforce § 1738, the plaintiffs were attempting to invoke jurisdiction under 28 U.S.C. § 1331 (1982) on the ground that actions to enforce state court judgments *in the first instance* "arose under" federal law. *See* Minnesota v. Northern Sec. Co., 194 U.S. 48, 72 (1904); Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151 (5th Cir. 1974); New York v. Holy Spirit Ass'n for World Unification, 464 F. Supp. 196

issue of *corrective* federal court power when section 1738 has been violated by a state court.[144] Thus, the legal context provided by section 1738 at most suggests the *absence* of a federal court corrective *practice*.[145] This absence may create a reasonable inference that Congress did not focus on the issue of federal corrective power, but it does not support an inference that Congress affirmatively considered and rejected that power.

To this point in the analysis, it appears that statutory language, legislative history, and judicial precedent are inconclusive of the issue of an implied remedy to correct state court violations of the PKPA. The best conjecture is that Congress *might* have been reluctant about increasing the workload of the federal courts, but beyond that, any inference of congressional intent is highly speculative. There is a further inquiry under *Cort*, however, that strengthens considerably the inference that Congess did not intend to create a remedy under the PKPA. This inquiry is directed toward federal statutory provisions that interrelate with the argued statutory remedy under the PKPA.

The remedy sought to be inferred under the PKPA has as its ultimate goal the termination of a state proceeding or the nullification of a state judgment that violates the PKPA.[146] As discussed more fully in a later section of this Article, the PKPA remedy will thus run afoul of the Anti-Injunction Act, 28 U.S.C. section 2283.[147] The Anti-Injunction Act flatly prohibits any interference with state court proceedings unless Congress creates an "express" statutory exception;[148] and such express exceptions have never been found in statutes, like the PKPA, that fail to explicitly authorize *any* federal relief.[149]

Although this Article maintains that the Anti-Injunction Act would prevent equitable enforcement of the PKPA even if an implied remedy were found,[150] this prohibition has obvious bearing on the process of implication. Congress' presumed awareness of the greater body of federal law negates the inference that it intended an implied remedy under the PKPA; otherwise, Congress would have made its remedy

---

(S.D.N.Y. 1979); Luterman v. Levin, 318 F. Supp. 11 (D. Md. 1970). *See also* 13B FEDERAL PRACTICE AND PROCEDURE, *supra* note 7 § 3563, at 50. The apparent basis for rejecting this use of § 1331 is that the connection between the action to enforce a state judgment and the mandate of 28 U.S.C. § 1738 (1982), "is not sufficiently direct that it can be said that the case 'arises under' the clause." *Id.* These cases do not, however, address the question whether there is an implied remedy under § 1738 per se—which is analytically distinct from the question of § 1331 jurisdiction. *See infra* text accompanying notes 168–76.

144. The sole decision discovered on the point actually *recognizes* federal court authority to correct a state court's denial of full faith and credit to a judgment—albeit in reliance on the federal remedy provided by 42 U.S.C. § 1983 (1982). *See* Lamb Enters. v. Kiroff, 399 F. Supp. 409, 413 (N.D. Ohio 1975), *rev'd on other grounds*, 549 F.2d 1052 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977).

145. Past Court decisions that have examined the legal context of congressional action appear to have addressed Congress' perception of *reported* case law. *See, e.g.*, *supra* note 140; *see also* Brown v. General Serv. Admin., 425 U.S. 820, 828 (1976). It is questionable whether one can attribute to Congress an intent to perpetrate a view that is not represented by apposite judicial precedent—particularly when there is no reference in legislative history to either judicial precedent or alleged judicial practice.

146. *See supra* text accompanying notes 64–67.

147. *See infra* text accompanying notes 216–73.

148. See *infra* text accompanying notes 216–73.

149. *See infra* text accompanying notes 246–65.

150. *See infra* text accompanying note 240.

express so as to except the PKPA from the Anti-Injunction Act's prohibitions.[151] To conclude differently would lead to one of two equally implausible results: Congress implied a PKPA remedy that is a functional nullity; or Congress created by implication an express exception to a centuries-old federalism protection.

Therefore, the shadow of the Anti-Injunction Act casts considerable doubt on the argument for an implied right of action under the PKPA. This doubt, moreover, arguably rises to the level of affirmative evidence of congressional intent which, under the Court's recent interpretations of *Cort*, could foreclose further inquiry under the third and fourth factors of that test.[152] However, given the prominence that factor three has assumed in the opinions of those federal courts recognizing a federal remedial role,[153] that factor merits consideration. We turn, then, to the following inquiry: "Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . ?"[154]

C. *Promoting the Purposes of the PKPA Through Implication of a Federal Remedy*

The third *Cort* factor, it is important to reemphasize, cannot countermand evidence demonstrating congressional intent not to create a remedy.[155] Consistency of the remedy with the legislative scheme, whatever the remedy's salutary effect, does not alone satisfy the *Cort* burden. The only possible exception to this conclusion might occur if negation of an implied remedy would totally frustrate the congressional enactment. If total frustration is the result, one could reasonably argue that inference of a remedy is necessary to avoid nullification of Congress' enactment. After all, Congress cannot be presumed to engage in meaningless legislative action.[156]

This argument has been made by the Third and Fifth Circuits in support of their conclusion that federal court relief is available to enforce the PKPA.[157] As stated by the Third Circuit in particular, "[a]ltogether denying parents a district court forum for lawsuits claiming violation of rights under section 1738A would come close to a

---

151. *See infra* text accompanying note 271.

152. *See, e.g.*, Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 94 n.31 (1981) ("In a case in which neither the statute nor the legislative history reveals a congressional intent to create a private right of action for the benefit of the plaintiff, we need not carry the *Cort v. Ash* inquiry further." (citations omitted)) (refusing to examine factors three and four upon "definitely" concluding that Congress intended no implied remedy); Transamerica Mortgage Investors, Inc. v. Lewis, 444 U.S. 11, 23–24 (1979) (refusing to consider factors three and four); *see also* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 388 (1982) (disposing of the remedial question on the basis of factors one and two).

153. *See infra* note 157.

154. Cort v. Ash, 422 U.S. 66, 78 (1975) (citation omitted).

155. *See supra* note 152.

156. *See* Sunstein, *supra* note 72, at 1419–21.

157. *See* Heartfield v. Heartfield, 749 F.2d 1138, 1140 (5th Cir. 1985) (PKPA rights would be "substantially abridged if no means existed for forcing a noncomplying state to abide by the terms of the Act"); Flood v. Braaten, 727 F.2d 303, 312 (3d Cir. 1984) (the PKPA would be "virtually nugatory" in absence of federal court power to enforce state compliance). The Third and Fifth Circuits do not employ an implied-rights analysis in reaching their conclusion that federal relief is available. *See supra* note 104. Given their failure to discuss an alternative state remedy for enforcement of the PKPA, however, the existence of a federal remedy must be discovered to provide a foundation for federal jurisdiction.

judicial repeal of those statutory rights. 'To take away all remedy for the enforcement of a right is to take away the right itself.' "[158]

The Third Circuit's view is premised on an interpretation of the PKPA that is unrealistically narrowed by the special incidents of PKPA litigation that has occurred in the federal courts. It is true that, as in the case before the Third Circuit, denial of federal relief may sometimes frustrate enforcement of federal rights.[159] Two states may differ in their interpretations of the PKPA and enter inconsistent orders. Unless one of these orders is corrected by the state appellate courts or by the United States Supreme Court, some litigant's PKPA rights will be lost. But does this lead to the conclusion that the PKPA will be nullified in the absence of an implied cause of action?

The first response is that there is a federal remedy for violations of the PKPA—Supreme Court review.[160] Though such review may not in practice be easily attainable,[161] this is no different from the situation pertaining when state courts commit other forms of federal error. An even more telling response is that the PKPA works, and apparently works fairly well, in the absence of federal relief. As discussed later,[162] the state courts have demonstrated a willingness to restrain themselves when so required by the PKPA. This is the principal enforcement mechanism anticipated by Congress,[163] and its apparent success—though not a complete one—refutes the contention that the PKPA is "virtually nugatory" in the absence of an implied federal remedy.

Accordingly, a rational Congress might well have enacted the PKPA in dependence on state court enforcement, notwithstanding the predictable result that some PKPA claimants may lose their rights through state court error. An implied federal remedy, concededly, would probably reduce the frequency of lost rights. Yet, this improvement on the PKPA cannot come from the courts without congressional authorization of at least a constructive form. No such authorization can be found in any of the sources recognized by the *Cort* test.

In summary, neither constructive legislative intent nor statutory necessity supports inference of a federal equitable remedy to correct state court errors in applying the PKPA. The most that one can confidently assert about the statute's history is that Congress repudiated a first-instance enforcement role for the federal courts, and in so doing evidenced some concern with the federal courts' workload. Congress' views about corrective federal court power, by comparison, are really not known; this void, however, does not constitute the affirmative authorization required by *Cort*.

---

158. Flood v. Braaten, 727 F.2d 303, 312 (3d Cir. 1984) (citation omitted).

159. The record in Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984) (citation omitted), is a nightmarish parade of contempt sanctions and arrest resulting from the irresolvable impasse between two state courts, neither of which was willing to abandon its claim to jurisdiction. *Id.* at 303–06. There is no indication, however, that either custodial claimant sought Supreme Court review. For similar dilemmas, see McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); and DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984).

160. *See* 28 U.S.C. § 1257(3) (1982).

161. *See supra* note 6.

162. *See infra* text accompanying notes 479–81.

163. *See supra* text accompanying notes 55–63.

Moreover, the Anti-Injunctive Act looms as a threat to any federal court remedy lacking explicit congressional support. This threat is presented by the special nature of the relief sought under the PKPA, which entails unavoidable interference with state court adjudication. Congress has issued an uncategorical command in the Anti-Injunction Act, requiring that Congress itself speak expressly if it wishes to rescind that command. Accordingly, if any PKPA remedy is to overcome this impediment, it must be a remedy that finds its source other than through implication and creative statutory interpretation.

IV. Enforcement of the PKPA Through State-Created Remedies

The conclusion that Congress did not impliedly create a cause of action for enforcement of the PKPA does not negate the existence of any federal court enforcement power. Federal courts have historically exercised authority to enforce state-created causes of action provided there is *jurisdictional* authority to entertain the cause of action. Jurisdictional authority may derive from several sources: the state cause of action may be pendent to a federal cause otherwise properly before the federal court;[164] the state cause of action may so necessitate resolution of a federal law question that the case can be said to "arise under" federal law;[165] or the state cause of action may come before the federal court because of the parties' diverse citizenship.[166] Because all states provide a remedial cause of action to enforce child custody orders, it is possible that a federal court could invoke one of the above-mentioned jurisdictional grounds to justify providing relief under the PKPA. That is, a federal court might entertain a custody order enforcement action based on state law, and address the contention that the custody order was entered in compliance with the PKPA and hence is entitled to interstate enforcement.[167]

One jurisdictional basis for such an action—pendent jurisdiction—can be ruled out, since there is no federal cause of action likely to arise in connection with child custody disputes. This leaves, then, "arising under" jurisdiction and diversity jurisdiction as the arguable bases for obtaining federal court enforcement of the PKPA. We now turn to consideration of these alternatives.

A. *"Arising Under" Jurisdiction*

The Court has long recognized that federal law may so insinuate itself into a state cause of action that the cause may be said to "arise under" federal law, thereby

---

164. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) ("The state and federal claims must derive from a common nucleus of operative fact. . . . [I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.") *See generally* 13B Federal Practice and Procedure, *supra* note 7 §§ 3567, 3567.1, at 106, 114.

165. *See infra* text accompanying notes 168–70.

166. *See infra* text accompanying notes 194–95.

167. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) ("arising under" jurisdiction); Davis v. Davis, 638 F. Supp. 862, 864 (N.D. Ill. 1986).

creating federal question jurisdiction under 28 U.S.C. section 1331.[168] The 1921 case of *Smith v. Kansas City Title & Trust Co.* stated as follows:

> The general rule is that where it appears . . . that the right to relief *depends* upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under [section 1331].[169]

More recently, the Court has affirmed that federal question jurisdiction may be found "where the vindication of a right under state law *necessarily turn[s]* on some construction of federal law."[170]

Child custody litigation, in which there is interstate conflict of the type regulated by the PKPA, seems well suited for jurisdiction under the *Smith* standard. Consider, for example, the parent who wishes to secure custody in state *B* pursuant to a custody order rendered by state *A*. As a prerequisite to interstate enforcement of her custody order, the PKPA requires that the parent establish that state *A*'s order is valid under the PKPA (and hence that any inconsistent order is invalid). Thus, interstate enforcement "necessarily turns" on construction and application of the PKPA. This is, in fact, the conclusion of the Eleventh Circuit in *McDougald v. Jenson*,[171] which held that, regardless of whether an implied cause of action can be found under the PKPA, a custodial enforcement action necessarily depends on the application of federal law and so arises under federal law.[172]

The decision in *McDougald* has been substantially undercut by the Supreme Court's 1986 decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*.[173] In *Merrell Dow*, the Court broadly held as follows:

> [A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'[174]

---

168. *See generally* 13B FEDERAL PRACTICE AND PROCEDURE, *supra* note 7 § 3562, at 17.

169. 255 U.S. 180, 199 (1921) (emphasis added).

170. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (emphasis added).

171. 786 F.2d 1465 (11th Cir. 1984), *cert. denied*, 107 S. Ct. 207 (1987).

172. [T]he fact that we have not found an implied federal cause of action or federal remedy authorized by section 1738A will not defeat federal jurisdiction in a case such as this. (citations omitted) Thus even if Congress, by enacting the PKPA, is found not to have created a federal cause of action that did not previously exist, so that an enforcement action in federal court might have to be dismissed for failure to state a claim upon which federal relief can be granted, Congress did legislate in a manner that expanded the federal court jurisdiction of the district courts. Because the plaintiff's well-pleaded complaint in a coercive action seeking enforcement of a foreign custody decree would establish [its validity under the PKPA], federal question jurisdiction over such an action would exist.

Id. at 1480.

Ostensibly, the approach of the court in *McDougald* would also authorize federal jurisdiction in the *first instance*: that is, a party relying on a custody judgment could seek to enforce it in a federal court, in reliance on sister state enforcement remedies, *prior* to the sister state's refusal to enforce the order. Extension of the *McDougald* rationale this far, however, *would* seem to conflict with congressional intent in enacting the PKPA. *See supra* text accompanying notes 107–19. Therefore, *McDougald* is best read as recognizing arising under jurisdiction where the custodial enforcement action corrects a state court's refusal to enforce a custody order in accordance with the PKPA. This, in fact, was the situation faced by the *McDougald* court.

173. 106 S. Ct. 3229 (1986).

174. *Id.* at 3237.

If *Merrell Dow*'s conclusion is taken literally, its impact on the PKPA tack taken in *McDougald* is clear: Congress' decision not to create a federal cause of action "is deemed a proxy for the ultimate question whether or not Congress intended to confer federal jurisdiction."[175] For this reason the District of Columbia Circuit recently refused to follow the approach taken by the Eleventh Circuit in *McDougald*, and concluded instead that the absence of a federal remedy to enforce the PKPA belied invocation of federal jurisdiction to enforce a related state remedy.[176]

At least one commentator has suggested that *Merrell Dow* should not be read literally.[177] Argued instead is that *Merrell Dow* should be confined to situations where, as in *Merrell Dow*, there are no "important federal interests" subserved by recognition of a federal jurisdictional power.[178] There is discussion in *Merrell Dow* from which one could infer a less rigid rule for identifying federal question jurisdiction. Both in *Merrell Dow* and in the Court's other recent discussion of federal question jurisdiction, the Court has urged the importance of making "sensitive," "practical" judgments that reflect "sound judicial policy."[179] Such judgments might consider congressional intent, perceived statutory policy, and the needs of the federal judicial system. Drawing upon these considerations, one might argue that PKPA litigation arises under federal law notwithstanding the literal prohibition of *Merrell Dow*.[180]

The federal interest at stake in *Merrell Dow* was, in fact, less substantial than that in PKPA litigation. In *Merrell Dow*, the plaintiffs had attempted to embellish their state law tort action by asserting that violation of the federal Food Drug and Cosmetic Act (FDCA) created a rebuttable presumption of negligence. Otherwise, state law predominated in a suit where five of the six claims arose purely under state law.[181] At stake under the single federalized claim was merely another legal basis for monetary recovery. Furthermore, enforcement of the federal FDCA was hardly dependent on the viability of state tort claims; the FDCA provided for significant public enforcement mechanisms apart from private damages actions.[182]

---

175. *See* Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987).

176. *Id.*

177. *See* Note, *The Supreme Court, 1985 Term, Leading Cases*, 100 HARV. L. REV. 100, 239 (1986).

178. The author concluded as follows:

> [T]he focus should be on the nature of the federal interest and not on whether the cause of action is federally created. . . . [P]erhaps the best way to read the Court's opinion is to limit its application to cases like *Merrell Dow*, where the absence of a statutory remedy is meaningful—cases in which, absent the private remedy, there is no demonstrated overriding federal interest in the outcome of the case. But if the constitutionality of the federal statute is at stake, or some important interpretation of that statute will be necessary to adjudicate the case, the claim should still 'arise under' federal law for purposes of federal question jurisdiction. *Id.* at 239–40.

179. *See* Merrell Dow Pharmaceuticals Inc. v. Thompson, 106 S. Ct. 3229, 3233–34 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 (1983).

180. An amicus brief filed in *Thompson v. Thompson*, generally makes the case for federal jurisdiction as follows: "Consideration of Congress' goals in enacting the PKPA, the impact of the statute on state child custody proceedings, and the lack of an express omission of a private federal cause of action counsels against according great significance to Congressional silence on the virtual impasse situation." Amicus Brief of the Women's Legal Defense Fund and Parents Without Partners at 20. Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert granted*, 107 S. Ct. 946 (1987). The brief's ultimate emphasis is on the federal interest in resolving PKPA jurisdictional conflicts—an interest said to be much greater than the interest in state tort law raised in *Merrell Dow*. *See id.* at 20–21.

181. Merrell Dow Pharmaceuticals Inc. v. Thompson, 106 S. Ct, 3229, 3231 (1986).

182. *See id.* at 3244.

By comparison, federal court relief under the PKPA is the sole original means of enforcing the PKPA through federal action.[183] Moreover, unlike the situation in *Merrell Dow* where state courts were presumptively hospitable to state-created tort and contract actions, state courts enforcing the PKPA harbor the potential for prejudice against federal law. Since state courts are the very targets of federal regulation, it is eminently reasonable to question their solicitude for federal claims used to attack their adjudicatory authority.[184] This fear of state court insolicitude for federal law has been an historical justification for the recognition of federal question jurisdiction.[185]

While the above argument provides a plausible basis for distinguishing *Merrell Dow*, it does not weather well under scrutiny. Aside from the fact that *Merrell Dow* seems literally to foreclose "arising under" jurisdiction in custody actions, there are countervailing policy concerns supporting foreclosure. Dissenting in *Merrell Dow*, Justice Brennan noted that "the decision not to provide a private federal remedy should not affect federal jurisdiction *unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction.*"[186] Examining the apparent reasons for Congress' failure to provide a PKPA remedy, one finds that those reasons parallel the reasons for rejecting federal jurisdiction.

As discussed earlier, in rejecting one proffered remedy under the PKPA, Congress seems to have shown concern about increasing the burden of the federal courts' workload.[187] The identical concern would be raised if federal courts were found to have "arising under" jurisdiction to enforce the PKPA through state remedies. For, recognition of such jurisdiction would be tantamount to recognition of an implied remedy, given the existence in every state of a mechanism for enforcing custody orders.[188] State enforcement actions would be transformed generically into federal cases. To the extent, then, that Congress' inaction in creating a PKPA remedy can be traced to concern with the federal courts' docket, that same concern is presented by an expansive interpretation of "arising under" jurisdiction.

As also discussed earlier, one can reasonably impute to Congress at least a constructive awareness of the Anti-Injunction Act, which would prohibit federal court

---

183. The PKPA contains no administrative enforcement procedures.

184. *See, e.g.*, DiRuggiero v. Rodgers, 743 F.2d 1009, 1019 (3d Cir. 1984); Amicus Brief, of the Women's Legal Defense Fund and Parents Without Partners at 8–9, Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct, 946 (1987) (noting "the traditional state court preference for awarding custody to the local party.").

185. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 53 (1980); Note, *The Supreme Court, 1985 Term, Leading Cases*, 100 HARV. L. REV. 100, 237 (1980).

186. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 106 S. Ct, 3229, 3242 (1986) (Brennan, J., dissenting) (emphasis added). The majority also identifies the significant interrelationship of implied rights and arising under doctrine. After noting that the parties were in agreement that no implied cause of action was authorized by the FDCA, the Court specifically set forth the *Cort v. Ash* factors, *see supra* note 77, and then observed:

> [T]his is the first case in which we have reviewed this type of jurisdictional claim in light of these factors. . . . The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute.

Merrell Dow Pharmaceuticals Inc., v. Thompson, 106 S. Ct. 3242, 3234 (1986) (footnote omitted).

187. *See supra* notes 109, 114.

188. *See, e.g.*, Uniform Child Custody Jurisdiction Act § 13, 9 U.L.A. 151 (1979).

corrective action absent an express statutory authorization.[189] If the PKPA itself fails to carve out an exception to the federalism protections of the Anti-Injunction Act, nothing more is added by referring to the jurisdictional provisions of 28 U.S.C. section 1331. This grant of federal jurisdiction says nothing about the existence or exercise of remedial powers; to construe it as an express exception to the Anti-Injunction Act would produce a sweeping repeal of that Act's restrictions.[190] Therefore, Congress' failure to except the PKPA from the Anti-Injunction Act logically implies its unwillingness to circumvent the Anti-Injunction Act through creative interpretation of "arising under" jurisdiction.

Thus, the *Merrell Dow* interpretive presumption—that congressional withholding of a remedy entails withdrawal of "arising under" jurisdiction—seems applicable in litigation under the PKPA. If, as this Article assumes, Congress created no remedy for PKPA enforcement, the "sensible," "practical" conclusion[191] may well be that federal courts should not directly reverse that congressional decision through liberal interpretation of the admittedly amorphous "arising under" standard.

This conclusion ultimately stems from the express holding in *Merrell Dow*, influenced by the applicability of the Anti-Injunction Act. Otherwise, the policy assertions for and against "arising under" jurisdiction are probably in argumentative equipoise. But *Merrell Dow* is the latest attempt by the Court to impose order in the "welter of issues"[192] generated by the terse, unelaborated language of the federal question statute, and that order seems ever in the direction of constraint in the recognition of federal jurisdiction.[193] Stated simply, *Merrell Dow* leaves little room for judicial play when the impact of recognizing federal jurisdiction would be the same as if Congress created a federal remedy.

B. *Diversity of Citizenship Jurisdiction*

Disputes under the PKPA would seem well-suited for federal adjudication under 28 U.S.C. section 1332, which extends federal jurisdiction to litigation between citizens of diverse citizenship.[194] PKPA disputes are by their nature interstate

---

189. *See supra* text accompanying notes 143–51.

190. The federal courts have never found an "express" exception to the Anti-Injunction Act in a mere jurisdictional statute that does not refer to some federal remedial power. *See infra* text accompanying notes 253–62.

191. *See supra* note 178. There also does not seem to be a strong interest in ensuring federal court interpretation of the PKPA. Admittedly, some terms in the PKPA are capable of different meanings and federal court interpretation might work toward ensuring *uniformity* of interpretation. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 686–87 (D.C. Cir. 1987) (meaning of "home state"); McDougald v. Jenson, 786 F.2d 1465, 1482–84 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (interpretation of the statutory term "residence") DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984) (meaning of "commencement"). Two considerations, however, militate against the recognition of such a federal role. First, disuniformity is reduced only relatively when federal district courts, as opposed to state courts, interpret the PKPA. True uniformity would require Supreme Court interpretation, and such interpretation is available through the review of state court decisions. *See* 28 U.S.C. § 1257 (1982). More importantly, PKPA language is derived from uniform state jurisdictional statutes, *see supra* text accompanying notes 46–48, and PKPA litigation will simultaneously involve interpretation of state jurisdictional provisions. *See supra* note 49 and *infra* note 474. Thus, state courts accustomed to interpreting state jurisdictional law may have greater *expertise* in interpreting the PKPA even if they cannot ensure national uniformity in interpretation. *See infra* text accompanying note 479.

192. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983).

193. *See id.*; *infra* note 347.

194. *See generally* 13B FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, §§ 3601–10, at 334–506.

conflicts in which the claimants have ties with two different states. The tie sufficient to create citizenship under section 1332—physical presence in a state coupled with the intent to remain there indefinitely[195]—can be easily satisfied, for example, when one parent relocates in a different state following dissolution of a marriage. As a consequence, custodial enforcement actions under state law may qualify for federal jurisdiction regardless of whether Congress intended, in enacting the PKPA, to authorize an implied federal remedy or to permit "arising under" jurisdiction.

Yet, significant problems attend the recognition of diversity jurisdiction to resolve custodial litigation involving the PKPA. These problems, moreover, may have received the implicit consideration of Congress when it deliberated the PKPA's passage. The bill introduced by Congressman Fish, which would have recognized first-instance federal jurisdiction to enforce state custody orders, was itself a proposed amendment to section 1332.[196] The avowed purpose of the bill was to circumvent two established limitations on the exercise of diversity jurisdiction: the judicially created domestic relations exception, and the $10,000 amount-in-controversy requirement.[197] Since the bill was rejected by Congress, that legislative action may have bearing on the use of section 1332 to correct state errors in applying the PKPA.

The use of PKPA legislative history in determining the availability of diversity jurisdiction is, admittedly, distinct from its use in determining the issues of an implied federal remedy or "arising under" jurisdiction. The latter issues address congressional intent regarding the PKPA's role in federalizing custody litigation.[198] By contrast, section 1332 extends jurisdiction over interstate disputes because of perceived local prejudice *irrespective* of the role of federal law.[199] Therefore, the PKPA's legislative history is relevant to diversity jurisdiction only to the extent that it provides an interpretive aid to section 1332, or to the extent that it demonstrates an implied repeal of the otherwise express provisions of section 1332.

The domestic relations exception to federal jurisdiction, as indicated earlier, is not truly implicated by conflicts over state custody authority.[200] Were a federal court to entertain a diversity suit seeking to enforce one state's custody order, the court could limit itself to the narrow question of which state has authority under the PKPA.[201] The court's decision would serve as the premise for subsequent, supplemental enforcement in state court.[202] By so limiting itself to determination of this

---

195. *See, e.g.*, Hawes v. Club Equestro El Commandante, 598 F.2d 698, 701 (1st Cir. 1979); Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974). Notwithstanding the common law rule that the domicile of the husband is attributed to his spouse, modern courts readily recognize the spouse's independent domicile when dissolution of the marital relationship induces separation. *See* 13B FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 3614, at 555.

196. *See supra* note 113.

197. *See House Hearings*, *supra* note 114, at 9, 11; *see also* Flood v. Braaten, 727 F.2d 303, 310–11 (3d Cir. 1984).

198. *See supra* text accompanying notes 97–153, 173–93.

199. *See generally* H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PROCEDURE 402–06 (1984).

200. *See supra* text accompanying notes 128–37.

201. *See supra* text accompanying notes 128–31.

202. A federal court, of course, usually has the authority to order further, coercive relief to enforce its declaratory judgments. As provided in 28 U.S.C. § 2202, "Further necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202 (1982). Under preclusion doctrine, however, a declaratory judgment is conclusive of issues litigated and thus would bind the parties in a subsequent state court action. *See* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4446,

narrow jurisdictional question, the federal court could avoid any supervision of custodial change and any consideration of changed circumstances that might justify modification of the state custody order.

Thus, to the extent that Congress can be said to have reaffirmed the domestic relations exception in rejecting the Fish proposal for first-instance jurisdiction, Congress' concern is inapplicable to a federal diversity court that merely declares the resolution of a jurisdictional conflict. The federal court need not exercise domestic relations expertise, it need not apply substantive state law, and it need not involve itself with continuing supervision of the custodial claimants and the child.[203]

More problematic, however, is section 1332's amount-in-controversy requirement. Those federal courts that have considered the issue are in agreement that custody rights are nonquantifiable and hence cannot satisfy any monetary "amount" requirement.[204] The vintage Supreme Court decision on this point is *Barry v. Mercein*,[205] where the Court observed that custodial rights are "utterly incapable of being reduced to any pecuniary standard of value . . . ."[206] More recently, the Second Circuit followed *Barry*: "It appears to be settled law that custody and visitation rights are incapable of being reduced to any pecuniary standard of value. Consequently, the action here does not meet the $10,000 jurisdictional amount required by [section] 1332."[207]

This judicial interpretation of section 1332 might well be attributed to Congress in rejecting the Fish proposal. Both in interpreting the meaning of diversity under section 1332,[208] and in applying that section's amount-in-controversy requirement,[209] the Court has often imputed to Congress an intent to perpetuate judicial precedent restricting the statute's use. Particularly in light of the conscious effort by Congressman Fish to overcome the amount-in-controversy requirement in his unsuccessful proposal, it seems unlikely that the courts would be receptive to arguments seeking to expand section 1332 jurisdiction to PKPA controversies. Moreover, the amount-in-controversy requirement will be equally applicable whether the federal court is exercising first-instance or corrective jurisdiction.[210]

---

at 397; Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts*, 45 So. CAL. L. REV. 803 (1973). Accordingly, further federal relief would presumably be unnecessary.

203. *See supra* note 128.

204. *See, e.g.*, Barry v. Mercein, 46 U.S. (5 How.) 103, 119–20 (1847); Hernstadt v. Hernstadt, 373 F.2d 316, 317–18 (2d Cir. 1967).

205. 46 U.S. (5 How.) 103 (1847).

206. *Id.* at 120.

207. Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2nd Cir. 1967).

208. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (impleaded third-party defendant must be diverse from plaintiff before plaintiff can assert non-federal claim against third party).

209. *See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973) (class members may not rely on amount in controversy of plaintiff representative); Snyder v. Harris, 394 U.S. 332 (1969) (class members may not aggregate claims to satisfy amount-in-controversy requirement); *cf.* Aldinger v. Howard, 427 U.S. 1 (1976) (pendent jurisdiction cannot be asserted over defendant excluded from federal statutory coverage).

210. The requirement that PKPA enforcement satisfy the amount-in-controversy requirement, whatever the procedural context of the diversity action, probably explains why *none* of the reported decisions bases PKPA relief on § 1332. *But cf.* McDougald v. Jenson, 786 F.2d 1465, 1489 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (diversity alleged as basis for related state law claims).

The only possible means of satisfying the amount requirement of section 1332 is to aggregate the custody enforcement claim with another state claim that does satisfy the requirement.[211] Such a claim might be found in state tort causes of action for the wrongful taking of a child, which is sometimes an incident of interstate custody disputes.[212] This tack will succeed, however, only if (1) such causes are recognized by applicable state law, (2) such causes do not, themselves, implicate the domestic relations exception, and (3) congressional intent in rejecting the Fish proposal is not extrapolated to preclude *any* consideration of the PKPA in diversity suits. It is by no means clear that these prerequisites can be satisfied.[213]

Finally, there is the Anti-Injunction Act. Nothing in section 1332 can possibly be construed as an express exception to the Act, and clearly state law remedies will not do the excepting.[214] Thus, if we are correct in our following contention that the Anti-Injunction Act forbids declaratory statements about the custodial jurisdiction of a state court, not even a generous interpretation of section 1332 will provide the basis for enforcing the PKPA.

V. The Problem of the Anti-Injunction Act

To this point, this Article has examined the various remedial and jurisdictional arguments that claimants have asserted in seeking federal relief under the PKPA. It has suggested that legislative history, combined with fairly conservative contemporary Court precedent, undermines the conventional arguments in support of federal relief. This Article has also emphasized that the Anti-Injunction Act, 28 U.S.C. section 2283, figures prominently in the judicial search for federal court remedial authority. Section 2283, as suggested earlier, casts doubt on whether Congress contemplated the use of the lower federal courts to supervise state custody proceedings.[215] For, recognition of federal authority would present the dilemma of reconciling such authority with the manifest federalism restrictions of section 2283. It is to an elaboration of this dilemma, and its ultimate frustration of the bases for federal relief discussed above that this Article now turns.

The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[216] Despite section 2283's forcible and unequivocal prohibition of injunctions against state court proceedings, there has been striking disregard of the statute in litigation brought under the PKPA. Those federal courts

211. *See* Federal Courts, *supra* note 1, at 196 ("If a single plaintiff is suing a single defendant, Rule 18 permits the plaintiff to join as many claims as he may have against the defendant, regardless of their nature, and the value of all the claims is added together in determining whether the jurisdictional amount is met." (footnote omitted)).

212. *See, e.g.*, Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982).

213. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465, 1489–90 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (no state claim for taking of child by parent); Bennett v. Bennett, 682 F.2d 1039, 1042–43 (D.C. Cir. 1982) (equitable relief for child custody prohibited by domestic relations exception).

214. *See infra* text accompanying notes 245–62.

215. *See supra* text accompanying notes 147–52, 189–90, 213–14.

216. 28 U.S.C. § 2283 (1982).

that have halted state proceedings have evidenced no awareness of the potential inconsistency between their action and section 2283,[217] and those courts denying relief have failed to consider the more obvious support for their refusal provided by section 2283.[218]

It is helpful in assessing the import of section 2283 in PKPA enforcement actions to consider the various forms that PKPA relief might take. First, relief might be sought directly against the private plaintiff who commenced the state court action[219] or against the state judge who has improperly asserted custodial jurisdiction.[220] Second, relief might be sought during the pendency of the offensive state proceeding[221] or it might be delayed until actual entry of an objectionable custodial order.[222] Finally, relief might take the form of a simple declaratory judgment[223] or it might consist of an injunctive order enforceable through contempt proceedings.[224]

None of these variations on relief, however, will circumvent the restrictions of section 2283. The most obvious attempt to avoid the restrictions of section 2283—seeking a restraint against the private litigant rather than the state court—has been foreclosed by the Court. As Justice Black wrote in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,[225] "[I]t is settled that the prohibition of [section] 2283 cannot be evaded by addressing the order to the parties . . . ."[226] Although the point is, as the Court states, "settled," one suspects that the failure of the litigants and the federal courts to raise section 2283 in PKPA litigation may sometimes result from the absence of a state judge defendant in the lawsuit. Yet, this oversight is still difficult to justify, for "it is apparent that the proceedings of a state court upon a case are as much interfered with when one of the

---

217. *See supra* note 24.

218. *See supra* note 24. While the court in Rogers v. Platt 814 F.2d 683 (D.C. Cir. 1987) recognized that federal relief would upset state court judgments, it viewed the problem as one of *appellate* jurisdiction. *Id.* at 694. As this Article suggests below, the court's conceptualization of the nature of the problem is correct insofar as it goes. *See infra* text accompanying notes 321–45. The problem of the Anti-Injunction Act, however, is far more fatal to PKPA relief, since it cannot be circumvented as can the problem noted by the *Rogers* court. *See infra* text accompanying note 346.

219. *See, e.g.*, Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987); Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987); Heartfield v. Heartfield, 749 F.2d 1138 (5th Cir. 1985); Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984).

220. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (relief sought against judge and other custodial claimant); DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984) (relief sought against judge and other custodial claimant).

221. *See, e.g.*, Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987); Heartfield v. Heartfield, 749 F.2d 1138 (5th Cir. 1985); Templeton v. Witham, 595 F. Supp. 770 (S.D. Cal. 1984), *vacated*, 805 F.2d 1039 (9th Cir. 1986).

222. *See, e.g.*, Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987); McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984); Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984); Olmo v. Olmo, 646 F. Supp. 233 (E.D.N.Y. 1986); Davis v. Davis, 638 F. Supp. 862 (N.D. Ill. 1986); Wyman v. Larner, 624 F. Supp. 240 (S.D. Ind. 1985).

223. Although PKPA claimants routinely request both declaratory and injunctive relief, *see infra* note 224, the *McDougald* court observed that, by entering a declaratory judgment, it "was able to play the restrictive role it deemed appropriate in resolving a dispute arising out of a controversy whose merits the court was otherwise ill-equipped to handle." McDougald v. Jenson, 786 F.2d 1465, 1481 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987).

224. *See, e.g.*, Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987) (declaratory and injunctive relief sought); Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (declaratory and injunctive relief sought); Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984) (declaratory and injunctive relief sought).

225. 398 U.S. 281 (1970).

226. *Id.* at 287; *accord* County of Imperial v. Munoz, 449 U.S. 54, 58 (1980).

parties to the suit is enjoined from continuing the litigation as they are when the court itself is enjoined."[227]

Nor can section 2283 be avoided by skillful timing of the commencement of the federal action. It is literally arguable, of course, that PKPA relief could be deferred until after a state court proceeding has ended with the entry of a custody order. The PKPA claimant could then seek to enjoin the successful state court plaintiff from enjoying the results of the judgment, without interfering with ongoing state court litigation. This, in fact, is the tack taken by some PKPA plaintiffs.[228] It is a tack, however, plainly preempted by the Court: "The prohibition of [section] 2283 cannot be evaded by . . . prohibiting the utilization of the results of a completed state proceeding."[229] Or, as Justice Brandeis stated in defining the term "proceedings" as used in the predecessor statute to section 2283:

> That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to actions by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other.[230]

Thus, the PKPA action commenced following entry of a state court judgment runs afoul of section 2283, whether the federal plaintiff seeks to acquire custody of a child or seeks to preclude his successful state court opponent from doing so.[231] Section 2283 immunizes the judgment from federal interference at any time by any federal court.

There remains one other strategy to circumvent section 2283, a strategy as yet not expressly foreclosed by the Court. Because section 2283 literally prohibits federal injunctions against state court proceedings, there remains the possibility that mere declaratory relief might be viewed as a less intrusive remedy that is compatible with the PKPA. Apparent support for this position can be garnered from Supreme Court precedent.[232] For example, in granting relief against future state proceedings under the federal Declaratory Judgment Act, the Court has observed "[t]hat Congress

---

227. Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 372 (1930). For this reason the dissenting opinion in *Heartfield* is clearly wrong. ("The injunction runs only against one of the parties to this dispute, a dispute which is of the kind which lead to the passage of the PKPA. Nothing in the injunction in any way reflects upon or attempts to interfere with any decision of the Louisiana court." Heartfield v. Heartfield, 749 F.2d 1138, 1144 (5th Cir. 1985) (Williams, J., dissenting).)

228. *See supra* note 326. This Article is not suggesting, however, that this tack is taken with the intent of circumventing § 2283. It is more likely that the aggrieved party is simply attempting first to protect his rights in state court before resorting to federal relief.

229. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970); *accord* County of Imperial v. Munoz, 449 U.S. 54, 59 (1980).

230. Hill v. Martin, 296 U.S. 393, 403 (1935) (footnotes omitted).

231. *Compare* McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (federal plaintiff with child custody) *with* DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984) (federal defendant with child custody).

232. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974).

plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized . . . in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act."[233]

The attempt to avoid section 2283 by seeking declaratory relief should be unavailing. The quotation above was, after all, offered to support the granting of declaratory relief in a situation not governed by the Anti-Injunction Act—that where state proceedings had not yet commenced.[234] In addition, the Court's statement was offered partially in an attempt to demonstrate that declaratory relief requires a less ripe controversy than injunctive relief—and ripeness is not an issue in most PKPA actions filed in federal court.[235] More important, the Court's statement is countermanded by an earlier statement made in *Samuels v. Mackell*,[236] a case where prohibitions against injunctive relief were applicable: "Ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid."[237] Based on this pragmatic assessment, the court declined to authorize declaratory relief in *Samuels*.

Whether premised on interpretation of section 2283 or equitable considerations, the lower federal courts have rejected overwhelmingly the attempt to finesse declaratory relief through the statute's prohibitions.[238] The courts have, like the Court in *Samuels*, adopted a pragmatic view of declaratory relief, and have recognized that the practical impact of injunctive and declaratory relief is usually the same. It appears inevitable that the Supreme Court will confirm this view of section 2283. Interpreting the Tax Injunction Act, which expressly prohibits injunctions but not declaratory relief against state taxation efforts, the Court has forbidden declaratory relief because of its practical impact on state taxation schemes.[239]

Therefore, PKPA enforcement actions will violate the Anti-Injunction Act no matter how attempts at relief are fashioned. This leaves only one strategy to preserve federal court authority to grant relief. If a PKPA action can be construed as an express

---

233. *Id.* at 355. *See generally* Note, *Federal Declaratory Relief and the Non-Pending State Criminal Suit*, 34 MD. L. REV. 87 (1974).

234. *See* Steffel v. Thompson, 415 U.S. 452, 466 (1974); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978).

235. *See* Steffel v. Thompson, 415 U.S. 452, 471–72, 475 (1974). As indicated above, all federal courts agree that PKPA relief ripens upon a state court's wrongful assertion of custody jurisdiction. *See supra* note 65. Clearly such action presents an "actual controversy" within the meaning of 28 U.S.C. § 2201 (1982).

236. 401 U.S. 66 (1971).

237. *Id.* at 72.

238. *See, e.g.*, Thiokol Chem. Corp., v. Burlington Indus., Inc., 448 F.2d 1328, 1332 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Chandler v. O'Bryan, 445 F.2d 1045, 1058 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972); McLucas v. Palmer, 427 F.2d 239 (2d Cir.), *cert. denied*, 399 U.S. 937 (1970). As stated by the court in *Thiokol*, "Normally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments which, though not enjoining the state proceeding, would decide and preempt the matter pending there." Thiokol Chem. Corp., v. Burlington Indus., Inc., 448 F.2d 1328, 1332 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Since PKPA relief would seek an explicit declaration of the invalidity of a state custody proceeding, and since that declaration would have preclusive effect, *see supra* note 202, the practical effect of the declaratory action is to "preempt" the state proceeding.

239. The Tax Injunction Act, 28 U.S.C. § 1341 (1982), provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Court has now made clear that § 1341 prohibits declaratory relief. *See* California v. Grace Brethren Church, 457 U.S. 393 (1982).

congressional exception to section 2283, then consideration of section 2283 is unnecessary.[240]

While it at first appears anomalous to search for an express exception to section 2283 in a statute that is silent about federal court relief, there is precedent from which one could conceivably formulate an argument. To begin with, the Court has held that a claimed statutory exception "need not contain an express reference" to section 2283, nor need it "expressly authorize an injunction [against] a state court proceeding."[241] Instead, to qualify as an express exception to section 2283:

> [A]n Act of Congress must have created a specific and *uniquely federal right or remedy*, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. *The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.*[242]

It could be argued that the PKPA satisfies the Court's test by proceeding as follows. There can be little dispute that the PKPA creates a "uniquely federal right." No authority *other* than federal law could regulate interstate recognition of judgments and interstate allocation of jurisdiction.[243] Furthermore, to be given its "intended scope," the PKPA arguably requires a federal enforcement authority—in particular, a federal judiciary that can finally resolve disputes that arise when two states reach impasse in the application of the statute. Otherwise, the PKPA will amount to little more than the nationalization of uniform child custody acts, leaving federal law enforcement to the very state judicial authorities who sometimes are in conflict.[244]

It is apparent that the argument that the PKPA is an express exception to section 2283 overlaps considerably with the argument that the PKPA creates an implied cause of action.[245] But that is precisely the fault with the attempt to except the PKPA from section 2283 coverage: inference must build upon inference. Lacking an express federal remedy for PKPA violations, one must nevertheless argue that the non-express remedy constitutes an express exception to the Anti-Injunction Act. This is a result that wars with precedent and good sense.

The Court has often observed that, "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."[246] This federalism admonition works in tandem with another common law

---

240. *See generally* 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4224, at 327.

241. Mitchum v. Foster, 407 U.S. 225, 237 (1972); *accord* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 631 (1977).

242. Mitchum v. Foster, 407 U.S. 225, 237–38 (1972) (emphasis added) (footnote omitted); *accord* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 632 (1977).

243. *See supra* note 111.

244. *See supra* note 65 and accompanying text.

245. *See supra* text accompanying notes 155–63.

246. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 297 (1970); *accord* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630 (1977).

presumption—that courts will not readily recognize the implied repeal of a congressional enactment.[247] The prohibition of section 2283, in short, "is not to be whittled away by judicial improvisation."[248]

The discovery of an implied repeal of section 2283 through operation of the PKPA would be unprecedented. In every express exception to section 2283 found to date, the excepting language has *expressly authorized federal equitable relief in some form.*[249] Or, to quote from the Court's test for express exceptions, Congress has "*[clearly]* created a . . . right or remedy *enforceable in a federal court of equity.*"[250] Thus, in *Mitchum v. Foster*, where the Court found its most liberal exception to the Anti-Injunction Act in construing section 1983, that section expressly authorized federal "suit[s] in equity" to redress federal law violations by state authorities.[251] And in the Court's most recent discussion of section 2283 exception—where a majority of the Court appeared to recognize a limited exception to section 2283 under the Clayton Act—the Act authorized persons "to sue for and have injunctive relief [in federal court]."[252] It is noteworthy that in both these decisions, expressly *remedial* statutes were presented as exceptions to section 2283.

A review of lower federal court precedent confirms the position that federal law must contain some express authorization of federal injunctive relief if section 2283 is to be circumvented. For example, exceptions to section 2283 have been found under ERISA,[253] under the Interstate Commerce Act,[254] and under Title II of the Civil Rights Act of 1964,[255] all of which expressly authorize private injunctive relief against statutory violations. In perhaps the furthest, and most dubious, extensions of section 2283, some federal courts have found express exceptions under the Securities and Exchange Act[256] and the National Environmental Policy Act,[257] where governmental injunctive relief is authorized and where private injunctive relief is considered complementary to the governmental remedy. Other courts, however, have refused to

---

247. *See, e.g.*, Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954).

248. Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 514 (1955).

249. *See infra* notes 251–57.

250. Mitchum v. Foster, 407 U.S. 225, 237 (1972) (emphasis added).

251. *See id.* at 226 n.1.

252. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 631 (1977) (quoting 15 U.S.C. § 26 (1982)). *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 275 (1980). Other examples of statutory provisions recognized as exceptions to section 2283 include: (1) 11 U.S.C. §§ 105, 362 (1982) (authorizing bankruptcy courts to issue necessary "order[s]" to enforce the bankruptcy code, which code provided that a bankruptcy petition "operates as a stay" of state court proceedings); (2) 28 U.S.C. § 2251 (1982) (federal habeas remedy authorizing federal courts to "stay any proceeding . . . by or under the authority of any state"); (3) 11 U.S.C. § 203(5)(2) (1982) (since repealed) (authorizing federal courts to "stay all judicial or official proceedings in any court"); and (4) 28 U.S.C. § 2361 (1982) (permitting federal courts, in interpleader actions, to enter orders "restraining [claimants] from instituting or prosecuting any proceeding in any state"). *See generally* Mitchum v. Foster, 407 U.S. 225, 234–35 (1972). *See also infra* text accompanying notes 263–64.

253. *See, e.g.*, General Motors v. Buha, 623 F.2d 455 (6th Cir. 1980); Senco of Fla., Inc. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979); Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978).

254. *See* Tampa Phosphate R.R. v. Seaboard Coast Line R.R., 418 F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

255. *See* Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965).

256. *See* Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966). *See also* Jennings v. Boenning & Co., 482 F.2d 1128 (3d Cir.) (dictum), *cert. denied*, 414 U.S. 1025 (1973).

257. *See* Stockslager v. Carroll Elec. Coop., 528 F.2d 949 (8th Cir. 1976).

find exceptions to section 2283 when the federal statute is silent about private injunctive relief.[258]

There is thus no precedential support for the view that federal law lacking any companion remedial provisions can be construed as an express exception to the Anti-Injunction Act. At best, support could be argued from two statutory exceptions that are designed to protect federal jurisdiction. The federal removal statutes, for example, provide that upon removal of a case from state to federal court, "the State court shall proceed no further."[259] Similarly, federal legislation to limit the liability of shipowners provides that, upon the shipowner's depositing of the requisite funds in federal court, all related proceedings against the shipowner "shall cease."[260] Both statutory provisions are enforceable through federal court injunctive relief against state court litigation, even though neither provision directly authorizes equitable relief;[261] and both provisions bear linguistic similarity to the PKPA, which provides that a state court "shall not exercise jurisdiction" in situations governed by the statute.[262]

The removal and shipowners' provisions, however, are readily distinguishable from the PKPA. Both provisions are intended to insure that certain legal actions be litigated solely in federal court.[263] PKPA relief, by comparison, preserves no substantive dispute for federal adjudication. Moreover, these injunctions to protect the federal courts' jurisdiction are clearly authorized by the All Writs Act, 28 U.S.C. section 1651, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ."[264] Since the PKPA injunctive action in no way aids the assertion of federal jurisdiction in an independent federal action, the All Writs Act is inapplicable.[265] Thus, we again have the situation where express authority for some form of federal equitable relief is lacking.

In the absence of express authority to equitably enforce the PKPA, one must ultimately fall back upon policy justifications in seeking an exception to section 2283. Admittedly, such policy justifications are available to an extent not present in many challenges to application of the Anti-Injunction Act. Whereas federal antitrust or federal securities policy can be, and usually is, implemented through proceedings that

---

258. *See* Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980); Roth v. Bank of Commonwealth, 583 F.2d 527 (6th Cir. 1978); Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973); Vernitron Corp. v. Benjamin, 440 F.2d 105 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971); Board of Supervisors v. Circuit Court, 500 F. Supp. 212 (W.D. Va. 1980).

259. 28 U.S.C. § 1446(e) (1982).

260. 46 U.S.C. § 185 (1982) (former version). *See* Mitchum v. Foster, 407 U.S. 225, 234 (1972).

261. *See* Mitchum v. Foster, 407 U.S. 225, 234 (1972).

262. 28 U.S.C. § 1738A(g) (1982).

263. In fact, the Reviser's Note to § 2283 identifies the removal statute as an exception falling under the Act's phrase "in aid of its jurisdiction"; thus reliance on the express exception language of § 2283 is really not necessary or appropriate. *See supra* text accompanying note 216.

264. Section 1651 power was intended to operate unrestricted by § 2283, hence the latter statute's tracking of § 1651's language "in aid of . . . jurisdiction." Reviser's Note, 28 U.S.C. § 2283 (1982).

265. As indicated earlier, no one would seriously contend that federal courts can exercise jurisdiction to resolve substantive custody disputes. *See supra* note 34.

do not interfere with state court litigation,[266] the PKPA's policy speaks largely to the state courts. In fact, it is state court jurisdictional conflict to which the PKPA is especially addressed. Accordingly, one could argue, as have some courts in authorizing equitable relief under the PKPA,[267] that the denial of relief against offending state court litigation would render the statute toothless.

This attempt to overwhelm the Anti-Injunction Act with policy must fail. As discussed earlier, there is considerable doubt whether Congress, when enacting the PKPA, contemplated that the statute implied any form of federal equitable relief.[268] What is most clear is that Congress imposed an obligation on the state courts with an expectation that the various states would comply both in their own self interests and in the interests of interstate comity.[269] As discussed below, there is growing evidence that this scheme of state self-regulation is working albeit with predictable occasions of error.[270] Thus, the PKPA does not necessarily lose its efficacy in the absence of a general, federal equitable remedy, even if its efficacy is somewhat reduced. The argument for a policy-based exception to section 2283, accordingly, is not overwhelming, and certainly does not support the interpretive legerdemain that the PKPA is an express exception.

In summary, those lower federal courts that have enforced the PKPA through interruption of state court proceedings have failed to reconcile their action with the proscriptions of the Anti-Injunction Act. If the Anti-Injunction Act is to be circumvented, an express federal remedy for enforcement of the PKPA must be found. That leaves but one possibility—an action under section 1983 of the civil rights statutes.[271]

Before examining the viability of a section 1983 action, however, this Article considers one final restriction on PKPA litigation that pertains *whatever* the source of federal remedial power. As noted above, not only have most PKPA plaintiffs attempted to challenge offending state court proceedings, they have done so *after* the proceedings have yielded an undesirable custody judgment.[272] Federal relief, as a consequence, looks much like the de facto reconsideration of final state court decisions that, according to traditional full faith and credit doctrine, should only be scrutinized through state and Supreme Court appellate procedures.[273] Therefore, it is necessary to consider whether the common practice of PKPA plaintiffs is consistent with the mandates of full faith and credit, and, if not, whether procedural modification of that practice can make it so.

---

266. *See generally* L. Loss, Fundamentals of Securities Regulation 1007–1163 (1983); L. Sullivan, Handbook of the Law of Antitrust §§ 246–53 (1977).

267. *See supra* text accompanying notes 157–58.

268. *See supra* text accompanying notes 143–45.

269. *See, e.g.*, Addendum to *Joint Hearings, supra* note 43, at 140 ("The uniform custody approach to custody cases embodied in this provision should markedly reduce the number of custody cases which are relitigated in numerous states.") (comments of Senator Wallop), 207 (bill will "diminish" state jurisdictional conflicts) (comments of Congressman Ertel).

270. *See infra* text accompanying notes 479–81.

271. *See infra* text accompanying notes 347–485.

272. *See supra* note 222 and accompanying text.

273. *See infra* text accompanying notes 293–96.

VI. FINALITY AND PRECLUSION IN PKPA LITIGATION

A. *Decisional Finality and State Preclusion Rules*

Probably no tenet of federalism has received more robust endorsement from the modern Supreme Court than the principle of finality for judgments. The principle of finality, or full faith and credit as it is more commonly referred to, requires that all courts within the state and federal judicial systems accord proper preclusive effect to the final judgments of other courts.[274] This principle takes positive law form in article IV of the Constitution and section 1738 of the Judicial Code,[275] and operates to preclude both the relitigation of matters previously adjudged[276] and the litigation of omitted matters that should have been adjudged earlier.[277] Such respect for the finality of judgments persists even in the face of judicial error and conflicting social policy, so long as the proceeding that yielded the judgment meets minimum requirements of procedural due process.[278] Thus, the Court has required that full faith and credit be given to judgments that are fundamentally offensive to the moral policies of a sister state;[279] that may contain substantive constitutional error;[280] that compromise or preclude a litigant's opportunity to assert federal claims in federal court;[281] and that fail themselves to accord proper preclusive effect to the earlier judgments of other courts.[282] Notwithstanding the price that finality may exact in

---

274. Concerning the preclusive effect of state court judgments in federal court, the rule is clear:

> It has long been established that [28 U.S.C.] § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer v. Chemical Const. Corp., 456 U.S. 461, 481–82 (1982).

See also Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985).

275. Article IV § 1 provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." U.S. CONST. art. IV, § 1, 28 U.S.C. § 1738 (1982) provides in pertinent part that properly authenticated state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

276. This form of preclusion is customarily referred to as collateral estoppel or issue preclusion. *See* FEDERAL COURTS, *supra* note 1, at 680; 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4402. It is this form of preclusion, *i.e.*, preclusion of the issue of PKPA coverage, that is the principal concern of this section. *See infra* text accompanying notes 284–87.

277. This form of preclusion is customarily referred to as "true res judicata" or claim preclusion. See authorities cited in *supra* note 276. Claim preclusion also has bearing on PKPA litigation, for it entails that the omission of a *jurisdictional* challenge in custody litigation may preclude the party from raising the challenge in a subsequent federal court proceeding. *See infra* notes 304–05, 312–14 and accompanying text. It seems fairly well settled that jurisdictional challenges will be waived if not asserted by a party. *See, e.g.*, American Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1530–31 (9th Cir. 1985); Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1020 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

278. The Court has observed on several recent occasions that if the state courts would apply preclusion, a federal court must do so unless there is such a lack of fair opportunity to litigate as to constitute a denial of due process. Kremer v. Chemical Const. Corp., 456 U.S. 461, 480–82 (1982); *accord* Haring v. Prosise, 462 U.S. 306, 312–13 (1983). Lack of personal jurisdiction over the bound party, of course, would amount to a denial of due process. *See* Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 734 F.2d 639, 640–41 (11th Cir. 1984).

279. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908).

280. *See* Angel v. Bullington, 330 U.S. 183 (1946), *discussed in* J. MARTIN, CONFLICT OF LAWS 619 (2d ed. 1984).

281. *See, e.g.*, Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (claim preclusion in § 1983 litigation); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (claim preclusion in Title VII litigation); Allen v. McCurry, 449 U.S. 90 (1980) (issue preclusion in § 1983 litigation).

282. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

litigatory justice, the Court has emphasized that "[i]t is just as important that there be a place to end as there should be a place to begin litigation."[283]

The principle of finality has special importance in actions to enforce the PKPA. Its most obvious importance results from the PKPA's substantive provisions, which legislatively create "finality" for child custody judgments that are not traditionally given preclusive effect. Under the PKPA, a properly obtained custody order is final and preclusive of further judicial action until the rendering court either loses or declines to exercise jurisdiction to modify its order.[284] This issue of finality typically arises when custody litigants dispute whether a second court has, consistently with the PKPA, acquired authority to issue an order differing from an earlier judgment.[285]

But there is another issue of finality, usually overlooked by litigants, that recurs in the fact patterns of reported decisions: after a second state court has determined that it may act under the PKPA, and proceeds to enter a new custody order, is the second court's decision *concerning its authority* binding on the litigants? This second variation on the finality principle often arises in the following manner: Custodial litigant *X* obtains against litigant *Y* a favorable order in state *A*. Subsequently, litigant *Y* seeks from state *B* a custodial order inconsistent with that of state *A*. Litigant *X* appears in state *B*, argues that state *A*'s order is unmodifiable under the PKPA, and loses. State *B* then proceeds to enter a custody order that is, in fact, inconsistent with that of state *A*. At this point, litigant *X* either abandons his litigatory efforts in state *B*, or unsuccessfully appeals to the higher courts of state *B*. Ultimately, litigant *X* asks a federal court to reexamine the question of state *B*'s authority under the PKPA and to enjoin enforcement of state *B*'s custody order.

To what extent is a federal court bound by state *B*'s determination that it may properly exercise jurisdiction under the PKPA? The answer mandated by earlier court precedent seems clear. A state court has the power to decide its own authority to proceed in a case;[286] and that decision, if not reversed on appeal, is binding on all other courts to the extent that state preclusion rules render it binding.[287] Ostensibly, then, many PKPA defendants have overlooked a possible res judicata and full faith and credit defense that might be used to terminate summarily the federal litigation.[288]

---

283. Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

284. *See supra* text accompanying notes 60–65.

285. *See, e.g.*, cases cited *supra* note 222.

286. *See* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524–26 (1931).

287. *See, e.g., id.*; Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982); Durfee v. Duke, 375 U.S. 106, 111 (1963) ("[T]here emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.").

288. The preclusion defense has been discussed in only two of the reported decisions. In McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert denied*, 107 S. Ct. 207 (1987), the court rejected a preclusion claim premised on the custodial claimant's failure to assert the PKPA defense in the offending state court. *Id.* at 1483–87. The court rejected the claim because, as a matter of *state* preclusion rules, it found the offending state court judgment subject to collateral attack for want of subject matter jurisdiction. *Id.* at 1486. For a discussion of this finding, see *infra* notes 306–11 and accompanying text.

A similar preclusion challenge succeeded in Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985). In *Hooks*, the court observed that the PKPA issue had been raised and rejected in the allegedly offending state court. In contrast to the court in *McDougald*, the court in *Hooks* found that state law did not permit collateral attack on a judgment where the rendering court's lack of subject matter jurisdiction was not patent. *Id.* at 949–50.

Any residual doubts about the resolution of this question appear to have dissipated with the Court's 1986 decision in *Parsons Steel, Inc. v. First Alabama Bank*.[289] In *Parsons*, successful federal litigants found themselves subjected to litigation in state court, notwithstanding their belief that the earlier federal judgment precluded state court proceedings.[290] Relying upon 28 U.S.C. section 1738, the parties asserted their preclusion claim in state court, lost, and subsequently had final judgment entered against them.[291] They then returned to federal court and asked that the federal court, in effect, overturn the state court decision on the preclusion issue and enjoin enforcement of the state court judgment.[292]

The Supreme Court, in a unanimous opinion, rejected the argument that the federal court's admitted statutory power to protect its judgment[293] allowed the federal claimants to relitigate the preclusion issue:

> Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a . . . federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.[294]

The *Parsons* holding would seem to apply with greater force in PKPA litigation, where a federal court lacks even the statutory authorization to grant injunctive relief that was present in *Parsons*.[295] Accordingly, a state court's decision that the PKPA does not preclude its entry of a custodial order may foreclose the unsuccessful PKPA claimant from relitigating the issue in a lower federal court. If the preclusion rules of the state court interpreting the PKPA render that interpretation final and binding, the dissatisfied litigant must pursue relief in the state appellate courts or in the Supreme Court.[296]

Parsons, of course, requires consideration of state preclusion rules, and only protects the party relying on a state court decision if, and to the extent that, state law protects the litigant. At present, the various states' preclusion rules are highly diverse.[297] It is thus impossible to generalize about the operation of those rules in

---

289. 474 U.S. 518 (1986).

290. *See id.* at 770–71.

291. *See id.* at 770.

292. *See id.* at 770–71.

293. The parties claimed, and the lower federal courts held, that the district court had authority to enjoin the state proceeding under 28 U.S.C. § 2283 (1982), the Anti-Injunction Act, which provides in pertinent part: "A court of the United States may not grant an injunction to stay proceedings in a state court except . . . to protect or effectuate its judgments." *See also* 28 U.S.C. § 1651 (1982) ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ."). This exception to the Anti-Injunction Act, commonly referred to as the "relitigation exception," is discussed more fully *infra* in the text accompanying notes 443–53.

294. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986).

295. *See supra* text accompanying notes 68–70.

296. *See, e.g.*, Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986); Angel v. Bullington, 330 U.S. 183, 188–90 (1947).

297. *See* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4401.

PKPA litigation. Still, several considerations come to mind that are relevant in predicting their potential impact.

A requirement for all preclusion rules is that the state court rendering a judgment have *personal jurisdiction* over the party against whom preclusion is asserted.[298] At first glance, this requirement might appear lacking in some controversies that arise under the PKPA. If a parent, for example, seeks to assert a PKPA challenge to the custody judgment of a state with which she has little contact, that judgment would have no preclusive effect. According to *May v. Anderson*,[299] contacts would be lacking when the other parent has chosen to remove a child to the state where custody judgment was rendered and the complaining parent otherwise lacks appreciable connection (like marital domicile) with that state.[300]

As a practical matter, however, attacks on the personal jurisdiction of the court rendering a custodial order will usually fail. This is because the objecting party either will have sufficient contact with the state rendering judgment,[301] or will appear voluntarily in the state's courts.[302] Appearance in the court is sometimes a practical necessity because the foreign court *has* physical control over the disputed child, and the appearing custodial claimant will want to avoid entry of an unfavorable order and to secure physical custody of the child.[303] Sheer failure to appear and subsequent default may entail great risk. And if the claimant appears, the claimant will either permanently waive objection to personal jurisdiction[304] or, if the claimant challenges jurisdiction unsuccessfully, will be bound by the state court's finding of jurisdiction.[305]

Another problem that might arise when preclusion is argued in PKPA litigation is that of *subject matter jurisdiction*. Although there is lack of uniformity among states on this point, several states deny preclusive effect to their judgments when the rendering court lacks subject matter jurisdiction over a dispute.[306] This challenge

---

298. *See id.* at § 4430.

299. 345 U.S. 528 (1953).

300. *Id.* at 533. *See* CURRIE, FULL FAITH AND CREDIT, CHIEFLY TO JUDGMENTS: A ROLE FOR CONGRESS 1964 SUP. CT. REV. 89, 112–14.

301. *See, e.g.*, Thompson v. Thompson, 798 F.2d 1547, 1549–50 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (personal jurisdiction over non-resident parent upheld); McDougald v. Jenson, 786 F.2d 1465, 1487 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (personal jurisdiction over non-resident parent recognized); Flood v. Braaten, 727 F.2d 303, 309 n.21 (3d Cir. 1984) (personal jurisdiction recognized by implication). It may be significant that in none of the federal cases adjudicating a PKPA challenge has a challenge to personal jurisdiction been successfully asserted.

Professor Coombs, the leading commentator on the PKPA and the Uniform Child Custody Jurisdiction Act (UCCJA), has observed that the UCCJA (and the PKPA) can be viewed as *long-arm* statutes to the extent that the prerequisites for state court adjudication of a particular custody dispute simultaneously establish the requisite minimum contacts over the relevant custodial claimants. *See* Coombs, supra note 40, at 739–41. Professor Coombs has also urged that the PKPA's requirements for state custodial authority be construed consistently with due process requirements for personal jurisdiction, so that state assertion of custodial authority will necessarily entail consideration of the grounds for personal jurisdiction. *See id.* at 764. Finally, in testifying before Congress, Professor Coombs expressed the hope that the Supreme Court will ultimately be influenced by the PKPA in refining the requirements for personal jurisdiction in custody disputes. *See Joint Hearings, supra* note 43, at 150.

302. For a discussion of the effect of voluntary appearance on a court's power over personal jurisdiction, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 2.24 (3d ed. 1985).

303. *See, e.g.*, DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984).

304. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 2.24 at 94–95 (3d ed. 1985).

305. *See supra* note 286; *see* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4428, at 283–84 n.33.

306. *See, e.g.*, cases cited *supra* note 288.

initially seems well-suited to PKPA litigation, for the PKPA purports to regulate the exercise of subject matter jurisdiction by state courts.[307] Thus, one could argue, as have some successful PKPA litigants, that a state court judgment lacks preclusive effect as a matter of state law if the PKPA claimant can demonstrate a violation of the federal act.[308]

Even assuming a state's preclusion rules generally recognize a challenge based on lack of subject matter jurisdiction, preclusive effect is not necessarily extinguished. States, for example, may limit such challenges to special circumstances, and these circumstances may or may not be present in the particular PKPA suit.[309] Moreover, it is by no means clear that an alleged PKPA violation is tantamount to a challenge for lack of subject matter jurisdiction. Quite literally, the PKPA limits the *exercise* of subject matter jurisdiction by states that otherwise *retain* jurisdiction under their own laws.[310] If, as the PKPA indicates, there is legal distinction between what the PKPA permits and what state jurisdictional law permits, then a PKPA violation does not logically entail a failure of state jurisdiction. State preclusion rules could, therefore, treat PKPA violations as mere federal error not rising to the level of jurisdictional flaw.[311]

Potentially more fatal to a collateral federal court attack on state subject matter jurisdiction is the likelihood that the PKPA claimant will have appeared in the offending state court.[312] Like challenges to personal jurisdiction, challenges to subject matter jurisdiction can be forfeited;[313] and the state court's decision on a challenge to subject matter jurisdiction can be given preclusive effect.[314]

A last concern that may arise when state preclusion rules are invoked in PKPA litigation is the problem of finality. Traditionally, child custody orders are subject to modification according to the child's best interests and changes in circumstances.[315] Indeed, the absence of preclusive effect for custody orders prompted enactment of the PKPA. If the PKPA has been violated through entry of a custody order, then the finality created by the PKPA is arguably lost. One could contend, therefore, that the decision of a court in child custody litigation—including the decision whether it may

---

307. *See supra* text accompanying notes 46–61.

308. *See* McDougald v. Jenson, 786 F.2d 1465, 1485–86 (11th Cir. 1984), *cert. denied*, 107 S. Ct. 207 (1987); Olmo v. Olmo, 646 F. Supp. 233, 237 (E.D.N.Y. 1986). The *Olmo* court reached this conclusion summarily, and failed altogether to consider the applicable state preclusion rules.

309. *See, e.g.*, Hooks v. Hooks, 771 F.2d 935, 949–50 (6th Cir. 1985) (judgment must show juridictional defect on its face to be subject to collateral attack); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982) (detailing special circumstances); *cf.* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4428, at 282 ("[I]t seems clear that federal court judgments are binding notwithstanding a simple lack of subject matter jurisdiction, without regard to whether the jurisdictional question was litigated.").

310. *See supra* notes 47–49 and accompanying text.

311. *See* Hooks v. Hooks, 771 F.2d 935, 950–51 (6th Cir. 1985). It now seems well settled that alleged state court error in federal law application does not alone undermine the preclusive effect of a state judgment. *See id.* For a rare case in which a state court proceeding in violation of federal law was deemed void and subject to collateral attack as a matter of federal law, see Kalb v. Feuerstein, 308 U.S. 433 (1940).

312. *See supra* note 49 and accompanying text.

313. *See, e.g.*, Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377–78 (1940), *discussed in* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4428, at 281–82.

314. *See, e.g.*, Durfee v. Duke, 375 U.S. 106 (1963); Stoll v. Gottlieb, 305 U.S. 165 (1938).

315. *See supra* text accompanying notes 39–41.

exercise jurisdiction under the PKPA—is never final and hence never generates preclusive effect if the court errs in applying the PKPA.[316]

Whether child custody judgments operate totally outside the realm of finality and preclusion rules is ultimately a question of state law. But the traditional modifiability of custody orders should not be read too glibly as an abolition of the finality concept. Modification, after all, may be permitted only if circumstances *have* changed and the child's best interests *so* require.[317] Otherwise, custody orders are arguably final for at least the indefinite future. Furthermore, the inherent modifiability of custody orders does not imply that accompanying decisions, like that of original custodial jurisdiction, lack finality. A state court might well give finality to such ancillary decisions, and nothing in federal preclusion law restricts that choice.[318]

In summary, the invocation of state preclusion rules to foreclose a PKPA challenge in federal court is not without its difficulties, but PKPA defendants would do well to consider the preclusion defense. Many PKPA plaintiffs are relitigating their federal challenges at a time when the first challenge may have acquired judgmental finality. The Court's decision in *Parsons* is an unequivocal statement that such relitigation is subject to conventional state rules of preclusion. The states may, if they so choose, foreclose this relitigation.

All of which suggests the importance of timing. If the dissatisfied PKPA claimant wishes to avoid the impact of state preclusion rules, the best tack is to seek federal relief prior to entry of the offending state judgment. An expeditious challenge in federal court can outflank the entry of a final judgment entitled to full faith and credit[319] and, in fact, preclude the entry of a state judgment altogether. While this may appear a hypertechnical procedural maneuver, it is no different from the situation that normally pertains in inter-court disputes. Finality principles regularly permit, and even encourage, a "race to judgment" in which timing means all.[320]

B. *The* Rooker-Feldman *Doctrine*

In the previous discussion, we observed that the preclusive effect of state court judgments in custodial disputes is largely a matter for the state courts to determine. Given the diverse and uncertain contours of state preclusion rules, generalities cannot be offered. There remains the possibility, however, that federal doctrine might

316. This argument has not yet been made in the reported PKPA litigation.

317. *See supra* text accompanying notes 39–41.

318. Existing federal decisions uniformly treat the issue of finality as one of state law. *See, e.g.*, Hooks v. Hooks, 771 F.2d 935, 948 (6th Cir. 1985); Eichman v. Fotomat Corp., 759 F.2d 1434 (9th Cir. 1985); Bailey v. Ness, 733 F.2d 279, 281–82 (3d Cir. 1984).

319. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 685 (D.C. Cir. 1987) (federal action commenced prior to entry of custody order); Templeton v. Witham, 595 F. Supp. 770, 771 (S.D. Cal. 1984), *vacated*, 805 F.2d 1039 (9th Cir. 1986) (federal action commenced prior to entry of custody order).

320. *See, e.g.*, Hanson v. Denkla, 357 U.S. 235 (1958). It is worth note that there is some support for the view that the interlocutory decision of an issue may acquire practical finality prior to entry of the final judgment. *See, e.g.*, Towers, Perrin, Forster & Crosby, Inc. v. Brown, 732 F.2d 345, 348–50 (3d Cir. 1984); Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 538 n.11 (5th Cir. 1978). *See generally* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4434. In states where such practical finality is recognized, a state court's interlocutory ruling on a PKPA challenge might be entitled to preclusive effect. Because PKPA litigation in federal court is *premised* on initial state court rejection of the PKPA challenge, *see supra* note 65, there may be no means of obtaining federal relief in practical finality states.

provide an alternative source of uniform authority for resolving the question of whether, and when, the dissatisfied PKPA claimant may relitigate the federal challenge in a lower federal court. According to the emerging *Rooker-Feldman* doctrine, collateral federal relief might be forestalled regardless of the substance of state preclusion rules.[321]

The *Rooker-Feldman* doctrine originated in the 1923 decision, *Rooker v. Fidelity Trust Co.*,[322] in which the Court concluded that lower federal courts lack statutory jurisdiction to review the final judgments of state courts. Review was available, instead, only through appeal to the Supreme Court. *Rooker* indicated that, as a matter of interpretation of the jurisdictional provisions of the Judicial Code, judgments of state courts were insulated from lower federal court review;[323] thus, resort to the protection of state preclusion doctrine might be unnecessary.

Rooker did not have noticeable impact during the decades following its announcement, and some lower courts suggested that *Rooker* had been tacitly overruled by subsequent Court decisions.[324] In 1983, however, a nearly unanimous Court revived *Rooker* in *District of Columbia Court of Appeals v. Feldman*,[325] and the *Rooker-Feldman* doctrine took form. Since the Court's decision in *Feldman*, the doctrine has been invoked by lower courts on scores of occasions.[326]

As stated by the Second Circuit in its recent decision, *Texaco Inc. v. Pennzoil Co.*,[327] the *Rooker-Feldman* doctrine provides that:

> [A]n inferior federal court established by Congress pursuant to Art. III, § 1 of the Constitution may not act as an appellate tribunal for the purpose of overruling a state court judgment, even though the judgment may rest on an erroneous resolution of constitutional or federal law issues. The exclusive procedure for federal review is that specified by 28 U.S.C. § 1257.[328]

---

321. Based on the following analysis it would appear that all the PKPA cases addressing federal relief *after* entry of a state custody order are controlled by *Rooker-Feldman*. *See* cases cited at *infra* note 222. Neither the litigants nor the courts have alluded to the effect of *Rooker-Feldman*, however, and thus this defense—like the Anti-Injunction Act defense, *see supra* text accompanying notes 216–18—has gone unconsidered. The only court to obliquely refer to the problem posed by *Rooker-Feldman* is the D.C. Circuit in Rogers v. Platt, 814 F.2d 683, 689–90, 694–95 (D.C. Cir. 1987). In *Rogers*, the court suggested that, as a matter of judicial policy, federal courts should avoid engaging in a "quasi-appellate" review of state court decisions. *See id.* But the court did not specifically refer to *Rooker-Feldman* and its straightforward prohibition of federal court action.

322. 263 U.S. 413, 415–16 (1923).

323. *See id.* at 416 ("Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify [the state court judgment].").

324. *See, e.g.*, Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1233–36 (5th Cir. 1981).

325. 460 U.S. 462 (1983).

326. *See, e.g.*, Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir. 1986); Curry v. Baker, 802 F.2d 1302 (11th Cir. 1986), *cert. dismissed*, 107 S. Ct. 1262 (1987); Anderson v. Colorado, 793 F.2d 262 (10th Cir. 1986); Nordgren v. Hafter, 789 F.2d 334 (5th Cir.), *cert. denied*, 107 S. Ct. 177 (1986); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 107 S. Ct. 1519 (1987); Reed v. Terrell, 759 F.2d 472 (5th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 473 U.S. 907 (1985); Razatos v. Colorado Sup. Ct., 746 F.2d 1429 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

Surprisingly, the *Rooker-Feldman* doctrine has gone virtually unnoticed by the commentators. The sole exception discovered by the present authors can be found in Comment, Texaco Inc. v. Pennzoil Co.: *Some Thoughts on the Limits of Federal Court Power over State Court Proceedings*, 54 FORDHAM L. REV. 767, 777–83 (1986).

327. 784 F.2d 1133 (2d Cir. 1986).

328. *Id.* at 1142.

Applying the *Rooker-Feldman* doctrine in the context of PKPA litigation, a federal court might conclude that the PKPA claimant who has failed in his attempt to stop a state custody proceeding must appeal that decision to higher state courts or to the Supreme Court. Irrespective of state preclusion rules, collateral relief in the lower federal courts would be unavailable on federal jurisdictional grounds.

At first glance, one might question whether *Rooker-Feldman* applies at all when a PKPA litigant commences a federal equitable action to enjoin the adversary from enforcing a state custody judgment. Logic and semantics would justify classification of this action as an original rather than appellate proceeding, since prosecution of the federal action occurs within a procedural and jurisdictional framework distinct from that for appeals.[329] It is just such an argument, however, that was made unsuccessfully by the sole dissenting justice in *Feldman*, Justice Stevens.[330] The *Rooker-Feldman* doctrine ultimately views federal court actions functionally, and thus any collateral federal court action that examines issues "inextricably intertwined" with a state court judgment is viewed as a prohibited appellate proceeding.[331] Beyond argument, a PKPA challenge that seeks to re-examine the jurisdictional authority of a state court will be intertwined with the state court judgment, since the very purpose of the PKPA challenge is to upset the judgment.

There remain, nonetheless, aspects of the *Rooker-Feldman* doctrine that are not authoritatively resolved by the Court's decisions. One question concerns the *time* at which *Rooker-Feldman* becomes operative. Based on precedent applying the doctrine, as well as the Supreme Court's language in *Feldman*, it seems clear that the doctrine applies no earlier than upon entry of a judgment by the state court.[332] But does the doctrine, premised as it is upon the exclusive statutory review jurisdiction of the Supreme Court, only become pertinent after completion of state appellate court review? In both *Rooker* and *Feldman*, after all, the prohibited federal actions were filed upon completion of state appeals, at which time Supreme Court review had become ripe.[333]

The response of the lower federal courts has been that *Rooker-Feldman*'s proscriptions are not limited to the situation where there is appellate finality in the state court system.[334] Once again, the Second Circuit's elaboration of the Rooker-Feldman doctrine in *Pennzoil* is instructive:

---

329. *See* Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1236 (5th Cir. 1981) ("[I]f the district court has original jurisdiction, the fact that it does not have appellate jurisdiction over state court decisions (which is clear with or without *Rooker*) is irrelevant.").

330. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 488–90 (1983).

331. *See id.* at 486–87; Texaco Inc. v. Pennzoil Co., 107 S. Ct. 1519, 1529, 1532 (1987) (Scalia, O'Connor, Marshall, JJ., concurring); *see also* Worldwide Church of God v. McNair, 805 F.2d 888, 892 (9th Cir. 1986) (*Rooker-Feldman* applies to issues considered and decided by a state court); Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 3269 (1986).

332. *See, e.g.*, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983) (federal court is "without authority to review final determinations" of state courts; "a United States District Court has no authority to review final judgments of a state court in judicial proceedings."). In every case to apply *Rooker-Feldman*, the state court proceedings have concluded in final judgments. *See, e.g.*, cases cited in *supra* note 326.

333. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 475 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923).

334. *See, e.g.*, Worldwide Church of God v. McNAir, 805 F.2d 888, 893 n.3 (9th Cir. 1986); Hale v. Harney, 786 F.2d 688 (5th Cir. 1986).

> Allowing lower federal courts to review the judgments of state lower courts is as intrusive and as likely to breed antagonism between state and federal systems as allowing federal court review of the judgments of the states' highest courts. Indeed, if *Rooker-Feldman* only barred federal review of judgments which had been fully appealed through the state system, it would foster federal/state rivalry by creating incentives for disappointed state court appellants to forum-shop, jumping over to federal courts instead of appealing their cases to the states' highest tribunals.[335]

The Second Circuit's opinion is sound both for the policy reasons mentioned by the court, and as a matter of jurisdictional doctrine. While it is true that state judgments are not ripe for appeal to the Supreme Court until the state appellate process is exhausted, this simply reflects a timing requirement of 28 U.S.C. section 1257.[336] The absence of state appellate finality does not alter the practical reality that lower federal court review will constitute the functional equivalent of an appeal—and such appellate review, according to *Rooker-Feldman*, is totally lacking in statutory authority.[337] Thus, *Rooker-Feldman* is relevant at the time that the state trial court's judgment is final, regardless of whether section 1257 review is yet timely.

A final issue seemingly unresolved under *Rooker-Feldman* is the extent to which a state court litigant may *reserve* federal grounds from state court consideration, and later seek federal court consideration of these grounds if the state judgment is objectionable. Of course, this is not what has occurred in any of the reported decisions under the PKPA; but this was the strategy taken by Texaco in the recent *Pennzoil* litigation and recognized by the Second Circuit.[338]

The initial difficulty faced by a party who would reserve a federal claim to avoid *Rooker-Feldman* is that state preclusion rules might treat such nonassertion as a forfeiture. Preclusion doctrine, it should be remembered, also operates to forbid consideration of matters that *could* have been litigated in state court.[339] State rules of forfeiture, needless to say, could be superseded by federal law so as to preserve federal claims from forfeiture. The modern Court, however, has shown virtually no willingness to interfere with state preclusion rules simply because federal rights or a federal forum will be lost.[340] Accordingly, the state litigant who withholds a federal challenge does so at the peril of losing it under state law.

Indeed, the Court's opinion in *Feldman* casts considerable doubt upon state court reservations. The *Feldman* plaintiff in fact made a tentative attempt to reserve his federal claim in state court, and the Court facilely dismissed that attempt.[341] The

---

335. Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1142–43 (2d Cir. 1986), *rev'd on other grounds*, 107 S. Ct. 1519 (1987).

336. That section restricts Supreme Court review to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." 28 U.S.C. 1257 (1982).

337. *See supra* text accompanying notes 321–28.

338. *See* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144 (2d Cir. 1986).

339. *See supra* note 277.

340. *See, e.g.*, cases cited *supra* note 280. Indeed, the Court continues to leave open the issue whether state claim preclusion rules may preclude assertion of a federal claim that is within the *exclusive* jurisdiction of the federal courts. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985).

341. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 480 n.14 (1983). The Court dismissed the plaintiff's contention that he had attempted to reserve his federal claims for federal court consideration as "irrelevant to a consideration of whether these issues were before [the state court]." The Court then distinguished the one situation where reservation is admittedly possible—that of *Pullman* abstention, under which a party may reserve a federal claim

Court later observed that, "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court."[342] Lower federal courts have interpreted this statement to sharply limit, if not abolish, any right of claim reservation.[343] It is thus difficult to justify the Second Circuit's recognition of a reservation power in *Pennzoil*, other than to observe that the conclusion was unnecessary in light of the court's finding that, for other reasons, the *Rooker-Feldman* doctrine was inapplicable.[344]

As the discussion above indicates, there is such overlap between state preclusion rules and the *Rooker-Feldman* doctrine that they seem "two sides of the same coin."[345] Undoubtedly, the two provide alternative bases for challenging federal court action that revisits state court decisions. This combined threat confirms that, if PKPA relief is available, it must be sought expeditiously before the entry of a state custody judgment precipitates a defense on preclusion or *Rooker-Feldman* grounds.[346]

VII. Enforcement of the PKPA Under 42 U.S.C. Section 1983

Discussion to this point has centered on three concerns that arise when federal courts seek to correct state court errors in enforcing the PKPA: the problem of congressional authorization for such corrective power, the problem of the Anti-Injunction Act in exercising that power, and the problem of preclusion and the *Rooker-Feldman* doctrine when the power is exercised too late. The last problem, Court precedent makes clear, is one with which any form of federal relief must live. The first two problems, however, are not beyond solution. For more than a decade, the Supreme Court has shown a surprisingly robust hospitality for section 1983 actions used to correct the action of state authorities—even that of state courts. This precedent, which appears counterpoised to the Court's otherwise illiberal decisions

---

for consideration by the federal court in which the action was *originally* filed. *Id. See generally* M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 233–40 (1980) (discussing *Pullman* abstention and the power of federal claim reservation).

342. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484 n.16 (1983).

343. *See, e.g.*, Reed v. Terrell, 759 F.2d 472, 473 n.3 (5th Cir. 1985) (failure to raise claim may result in forfeiture); Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984) (party cannot deliberately bypass state consideration of federal claim); Wood v. Orange County, 715 F.2d 1543, 1547 n.3 (11th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) (forfeiture if party had reasonable opportunity to raise claim). *See also* Comment, Texaco Inc. v. Pennzoil Co.: *Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 Fordham L. Rev. 767, 781–83 (1986). The Supreme Court, in rejecting Texaco's claim that *Younger* abstention did not apply to its reserved federal claims, stated that "Texaco cannot excape *Younger* abstention by failing to assert its state remedies in a timely manner." Texaco Inc. v. Pennzoil Co., 107 S. Ct. 1519, 1529 n.16 (1987).

344. The Second Circuit also held that Texaco's challenge to the state's appellate bond requirement was not "inextricably intertwined" with the state court's decision. *See* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144 (2d Cir. 1986), *rev'd on other grounds*, 107 S. Ct. 1519 (1987).

345. Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 3269 (1986); *accord* Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir. 1986). In fact, the *Feldman* Court expressly reserved the question of whether the plaintiff's remaining claim might be foreclosed by the "doctrine of res judicata." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 487 (1983).

346. *See supra* notes 319–20 and accompanying text.

on federal court authority,[347] has promise to ameliorate the federalism concerns that prevent use of conventional federal remedies.

A. *The Applicability of Section 1983 to PKPA Violations*

One of the more intractable interpretive problems to arise in section 1983 litigation is the extent to which state court action is correctible under the statute.[348] While the Court has made clear that section 1983 was meant to remedy state action "whether that action be executive, legislative or judicial,"[349] its pronouncement cannot be taken too literally. State court action can assume quite varied forms, ranging from the passive determination of issues raised by private litigants,[350] to the active enforcement of judicial procedures like garnishment and attachment.[351] State courts can commit federal error by mere misinterpretation of federal law or by coercive action taken against parties in contravention of federal law. No one has seriously contended, however, that all the heterogeneous forms of state court activity which might touch upon federal law are grounds for a section 1983 claim.

As points of reference, one can identify the two extremes of judicial activity that mark the outer perimeters of section 1983 coverage. The first extreme is action by a state court judge that plainly exceeds the scope of her judicial power, yet is undertaken with the pretense of judicial authority. Such activity that violates federal law is under color of state law and renders the judge liable both for monetary and

---

347. Among the more significant decisions of the Court giving force to the § 1983 remedy are: Pulliam v. Allen, 466 U.S. 522 (1984) (state court judges not immune from prospective injunctive relief); Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982) (state remedies need not be exhausted prior to commencement of § 1983 action); Maine v. Thiboutot, 448 U.S. 1 (1980) (violations of federal statutes are actionable under § 1983); Owen v. City of Independence, 445 U.S. 622 (1980) (municipalities lack good faith immunity); Monell v. Department of Social Serv., 436 U.S. 658 (1978) (municipalities are actionable "persons" under § 1983); Mitchum v. Foster, 407 U.S. 225 (1972) (§ 1983 is an exception to the Anti-Injunction Act). The Court's interpretation of § 1983, needless to say, has not always been generous to § 1983 claimants. *See, e.g.*, Allen v. McCurry, 449 U.S. 90 (1980) (normal state preclusion rules apply to § 1983 litigation); Monell v. Department of Social Serv., 436 U.S. 658 (1978) (no respondeat superior liability for local government); Carey v. Piphus, 435 U.S. 247 (1978) (§ 1983 claimant must prove actual damages and may not recover for the intangible value of federal right).

By comparison, the Court has demonstrated a decided trend toward curtailing the exercise of federal jurisdiction outside the context of § 1983 actions. *See, e.g.*, Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229 (1986) (limiting "arising under" jurisdiction); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (limiting federal court jurisdiction over pendent state claims); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (limiting lower federal court review of state court action); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (limiting federal court jurisdiction over ancillary state claims); Zahn v. International Paper Co., 414 U.S. 291 (1973) (limiting federal court jurisdiction over diversity-of-citizenship controversies).

348. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court v. Consumers Union of Am., 446 U.S. 719 (1980); Stump v. Sparkman, 435 U.S. 349 (1978); Mitchum v. Foster, 407 U.S. 225 (1972); Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980).

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

349. *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

350. *See* Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1238 (5th Cir. 1981); Bottone v. Lindsley, 170 F.2d 705, 707 (10th Cir. 1948).

351. *See, e.g.*, Texaco Inc. v. Pennzoil Co., 107 S. Ct. 1519 (1987); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

equitable relief.[352] At the other extreme is the mere decision of a federal law question arising during the course of litigation. While a wrongful decision might be said to deprive the litigant of federal rights in some sense, mere decisional error does not per se give rise to a section 1983 cause of action.[353] Otherwise, section 1983 would constitute a source of collateral review power in the lower federal courts effectively mooting the more-difficult-to-invoke power of the Supreme Court to correct state court decisions.

Between the two extremes of the lawless state judge action and the quintessentially judicial task of enunciating the law lie disparate varieties of state court activity. The courts' historical attempt to define which activities are actionable under section 1983 has usually occurred in a special context—suits in which judicial involvement in private litigation has served as the premise for seeking relief *against the private party*.[354] That is, judicial involvement in a dispute between private parties has been argued to give color of state law to the activities of one of the parties, thus rendering the private party liable for equitable and usually monetary relief.

It is essential, in understanding the cases involving section 1983 claims based on judicial activity, to recognize that the private party is usually the alleged offender of federal rights. The import of these cases is to establish the extent of judicial involvement needed to invoke federal regulation of predominantly private behavior. The still enigmatic decision of the Court in *Shelly v. Kramer*[355] is an excellent illustration. In *Shelly*, the Court addressed whether the judicial enforcement of discriminatory real estate covenants entered into by private parties constituted state action sufficient to preclude enforcement under the fourteenth amendment.[356] The Court in *Shelly* responded affirmatively, and lower courts ever since have struggled to explain just how much state involvement will "constitutionalize" the litigatory activity of private parties.[357]

Constitutional state action, and color of state law under section 1983,[358] have been found when a private litigant somehow jointly participates with judicial personnel in bringing about injury to another.[359] For example, a section 1983 claim was sustained in the recent case of *Pennzoil Co. v. Texaco, Inc.*,[360] based upon the potential involvement of the state court plaintiff with judicial and law enforcement

352. *See* Stump v. Sparkman, 435 U.S. 349 (1978).

353. *See In re* Justices of the Supreme Court of P.R., 695 F.2d 17, 21 (1st Cir. 1982); Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1238 (5th Cir. 1981).

354. *See* J. COOK & J. SOBIESKI, 2 CIVIL RIGHTS ACTIONS ¶ 7.12[B][1],[2] (1986). Most direct challenges to judicial action have been disposed of on the ground of judicial immunity. *Id.* at 7–58. The decision in *Pulliam, see infra* text accompanying notes 367–77, does nothing to compromise this immunity in *damages* actions.

355. 334 U.S. 1 (1948).

356. *Id.* at 19.

357. *See generally* Henkin, Shelly v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Comment, *The Impact of* Shelley v. Kraemer *on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

358. The two concepts frequently arise together in litigation when § 1983 liability is premised on constitutional wrongs, which require "state action" as an element of the substantive wrong. In *Lugar* the Court observed that "it is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the fourteenth amendment are identical." Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1972).

359. *See, e.g., id.* at 939.

360. 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 107 S. Ct. 1519 (1987).

personnel asked to execute a state court judgment.[361] Likewise, color of state law has been found when a state court plaintiff invokes a state law remedy that directly authorizes the allegedly unconstitutional activity.[362]

The more common response of the courts, however, has been to deny section 1983 relief in instances of private litigation. As stated by one court, "There is no cause of action . . . if a case is private litigation in which the state does no more than furnish the forum and has no interest in the outcome."[363] Reflecting this view, the Eleventh Circuit in *McDougald v. Jenson*[364] summarily refused to recognize a section 1983 remedy for violations of the PKPA. According to the court,

> It is the general rule in this circuit that a private individual does not act under color of state law by engaging in litigation, even in bad faith, unless the individual is compelled by state law to bring suit or is acting under the authority or pretense of authority of the state.[365]

Contrary to the conclusion of *McDougald*, attempts to enforce the PKPA through section 1983 are not controlled by the private litigation cases. PKPA litigation is distinguishable from most of the private litigation cases in two important respects: the relief sought is equitable, and a potential defendant is the state trial judge.[366]

The Court's most recent examination of section 1983's role in regulating state trial courts is contained in *Pulliam v. Allen*.[367] In *Pulliam*, a closely-divided court upheld section 1983 equitable relief against a state magistrate who had engaged in the practice of jailing arrestees in connection with nonjailable misdemeanors. Rejecting the claim that state judges are immune from section 1983 actions to correct their official acts, the Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."[368]

The decision in *Pulliam* is significant for its reaffirmation of the utility of section 1983 to regulate state trial courts. In *Pulliam*, the Court considered a variety of concerns that attend lower federal court supervision of state trial courts, including common law judicial immunity and the special problems that arise when federal and state judicial authorities cross.[369] While signaling the need for caution, the Court's position was unequivocal: "We remain steadfast in our conclusion . . . that Congress intended section 1983 to be an independent protection for federal rights and find

---

361. *Id.* at 1145–47.

362. *See* Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1237 (5th Cir. 1981); Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

363. *See* Stevens v. Frick, 372 F.2d 378, 381 (2d Cir.), *cert. denied*, 387 U.S. 920 (1967).

364. 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987).

365. *Id.* at 1488–89.

366. It is significant that in most private litigation cases the § 1983 plaintiff seeks relief against *private* parties and usually seeks *damages*. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); Torres v. First State Bank, 588 F.2d 1322 (10th Cir. 1978); Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Stevens v. Frick, 372 F.2d 378 (2d Cir.), *cert. denied*, 387 U.S. 920 (1967). Note that in *McDougald*, *Harley*, and *Hill*, state court judges had been dismissed from the suits for lack of personal jurisdiction or because of judicial immunity.

367. 466 U.S. 522 (1984).

368. *Id.* at 541–42. It is noteworthy that in three of the Court's most recent examinations of § 1983 claims against state court judges, *Pulliam*; Dennis v. Sparks, 449 U.S. 24 (1980), and Stump v. Sparkman, 435 U.S. 349 (1978), no one contested the premise that judges act under color of state law while performing in their official capacities.

369. *See* Pulliam v. Allen, 466 U.S. 522, 528–42 (1984).

nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review."[370]

Pulliam involved an attempt to enjoin a state magistrate from engaging in an unconstitutional practice in future proceedings. One must initially consider, then, whether the decision has direct applicability when section 1983 relief is sought against a *pending* state proceeding. After all, federalism concerns become more palpable when federal relief interferes with state courts in the immediate course of their conduct.

That *Pulliam* cannot be limited to future proceedings is the unavoidable conclusion to be drawn from that case. Initially, it is noteworthy that *Pulliam* quotes from and reaffirms *Mitchum v. Foster*.[371] In *Mitchum*, the Court squarely addressed the applicability of section 1983 to pending state judicial proceedings, and did so in the face of the literal prohibition of the Anti-Injunction Act which otherwise prohibits federal court interference with pending state litigation. According to the Court in *Mitchum*, section 1983 actions constitute an express exception to the Anti-Injunction Act.[372] In so ruling, the Court emphasized that the Reconstruction Congress was fully aware that state judicial proceedings can be used to effect federal law violations and intended that section 1983 be used—as in *Mitchum*—to halt the violative state proceeding.[373] *Mitchum*, then, would make little sense if section 1983 relief were available only against judges not currently engaged in adjudicatory wrongdoing.

In *Mitchum*, the question of judicial immunity was mooted because the executive authority of the state was a party to the state proceeding and hence could be enjoined.[374] Since no such authority was implicated in *Pulliam*, it was necessary to address the issue of judicial immunity. In so doing, the Court cited substantial British and American precedent recognizing the availability of collateral relief against *pending* judicial proceedings.[375] Notwithstanding the historical availabiliy of appellate mechanisms to correct the action of trial courts, the Court observed that collateral relief had an undoubted pedigree in Anglo-American practice.[376]

More important, the Court emphasized that federalism concerns do not compel wholesale preclusion of a section 1983 remedy against state judges. As noted by the Court, "the limitations already imposed by the requirements for obtaining equitable relief" are adequate to protect the interests of federalism and comity.[377] *Pulliam*,

370. *Id.* at 541.

371. 407 U.S. 225 (1972).

372. *See id.* at 244. The opinion in *Mitchum*, it should be noted, was unanimous.

373. *See id.* at 238–42.

374. Both the law enforcement official who commenced the nuisance action against Mitchum and the state judge who enjoined Mitchum's business were named as defendants to the equitable action. *See id.* at 227.

375. *See* Pulliam v. Allen, 466 U.S. 522, 534–39 (1984) (noting "numerous" examples where British courts enjoined an inferior court "from proceeding with a trial or from committing a perceived error during the course of that trial"); *id.* at 533.

376. *See id.* at 536, 537–38 ("The fact that the error might be corrected on appeal was deemed to be irrelevant to the availability of a writ of prohibition."); *id.* at 534.

377. *Id.* at 537.

accordingly, recognizes the presumptive availability of section 1983 to enjoin state court activity, but imposes equitable restraints on the exercise of that power.

It is equitable doctrine, as we discuss below,[378] that removes the sting of the recognition of section 1983 relief to correct errant judicial action. In situations like those where PKPA violations are challenged collaterally in federal court, the court is counseled by *Pulliam* to exercise special restraint. Equitable relief against state court proceedings is to be the exception and not the rule. But federalism concerns must work their way through the exercise of lower federal court discretion, and not through the enunciation of exceptionless prohibitions. Spanning more than a decade of section 1983 interpretation, *Mitchum* and *Pulliam* affirm that section 1983's literal impact is not forestalled by the judicial character of state action.

One can identify few federal law commands that speak as directly to state courts as the PKPA. In its first part, the PKPA compels state courts to defer to the lawful custody decisions of other states. The PKPA's full faith and credit component states that, "The appropriate authorities of every State shall enforce . . . any child custody determination made . . . by a court of another State."[379] In subsequent provisions, the PKPA compels cessation of state court proceedings in violation of the PKPA. The statute, through a unique restriction on an otherwise traditional field of state jurisdiction, provides that, "[a] court of a State shall not exercise jurisdiction . . . during the pendency of a proceeding in a court of another State . . . ."[380] The PKPA, in short, is a federal command to state courts that can only be violated through the cooperation of the state judiciary.

Use of section 1983 to enforce the PKPA is thus qualitatively different from the situaton where a state court, without contrary federal law directive, is merely furnishing the private litigants a forum. Similarly, use of section 1983 to correct the error of a state court that improperly rejects a PKPA challenge differs from the situation where a state court merely errs in interpreting federal law. In the instance of the PKPA, the state court mistake inculpates the state in an independent violation of federal law addressed to the state court itself.

Assuming section 1983 relief is available against a state judge acting in violation of the PKPA, can the same relief be sought against the state court *litigant* who has commenced the violative action? The answer depends on whether the private litigant can be said to be acting under color of state law[381]—and this is the issue that has troubled courts historically in defining the availability of section 1983 to regulate judicially related conduct.

Before addressing this issue, one might ask whether relief against the private litigant is superfluous in light of the availability of relief against the judge. What reasons justify the inclusion of a private-party defendant? Two come to mind. For one

---

378. *See infra* text accompanying notes 456–68.

379. 28 U.S.C. § 1738A(a) (1982).

380. *Id.* § 1738A(g).

381. It is well established that "merely by holding its courts open to litigation of complaints . . . [the state] does not clothe persons who use its judicial processes with the authority of the state." Stevens v. Frick, 372 F.2d 378, 381 (2d Cir.), *cert. denied*, 387 U.S. 920 (1967); *accord* McDougald v. Jenson, 786 F.2d 1465, 1488–89 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987).

thing, suit against the state judge will probably require that the plaintiff bring action in a federal court located in the district where the offending state court judge presides; otherwise, personal jurisdiction over the judge may be unattainable.[382] Such travel to a distant federal court district might well entail some of the burdens that the distant state court action itself entails—added expense, inconvenience, and even a potential risk of some local prejudice. A second reason for suing the state court plaintiff, rather than the judge, is the federal courts' traditional disfavor of actions naming state court judges. In federal suits to enjoin state litigation that interferes with a federal proceeding, the courts have scrupulously avoided giving relief against the state court judge when relief against the state court litigant is adequate (as it most always is).[383] Consequently, PKPA plaintiffs might well sue their state court adversary alone.

The case for section 1983 relief against the individual custody litigant is far less clear than that for relief against a judge. According to the Court in *Lugar v. Edmondson Oil Co.*,[384] there are two requirements for a private litigant's conduct to be "colored" by state law.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[385]

Requirement one is easily satisfied in PKPA litigation, since the state court litigant will exercise state-created rights and remedies in seeking custody of a child. Such conduct is similar to the actionable conduct of other section 1983 defendants, who, for example, have invoked state garnishment and attachment procedures.[386]

Requirement two of the *Lugar* standard—necessitating that the actions of the private litigant be such as to constitute him a "state actor" or a "joint participant" with state officials—is more troublesome. Existing federal precedent strongly suggests that "a private party's mere invocation of state legal procedures" does not imbue that party with the color of state law.[387] As the Court has observed, for invocation of judicial processes to implicate the litigant in a section 1983 action there must be "something more."[388]

What constitutes that "something more" is unclear. A corrupt judge may implicate the litigant in a federal law violation by conspiring with the litigant;[389] and an invalid state statute may implicate the litigant when a suit is made in reliance on

---

382. In *McDougald* the federal district court sitting in Florida dismissed the claims against a Washington state judge for lack of personal jurisdiction. McDougald v. Jenson, 786 F.2d 1465, 1470 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987). Similar dismissal of claims against a non-resident state judge occurred in DiRuggiero v. Rodgers, 743 F.2d 1009, 1014 (3d Cir. 1984).

383. *See* DiRuggiero v. Rodgers, 743 F.2d 1009, 1014 (3d Cir. 1984).

384. 457 U.S. 922 (1982).

385. *Id.* at 937.

386. *See id.* at 937–39 (cases cited).

387. *See* cases cited *supra* note 381.

388. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

389. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 28 (1980).

that statute.[390] Most courts, however, refuse to attribute the adjudicatory actions of a trial judge to the litigant, unless exceptional circumstances are present.[391] Apparently, the independence of judicial decisionmaking distances the judge from the litigant, thus belying the claim that judge and litigant are joint participants under section 1983.[392]

The precedent, then, casts doubt on whether the PKPA claimant, who has failed in an attempt to halt a state court proceeding, can implicate an opponent in the judge's decision. This result is surely anomalous if applied to PKPA challenges seeking equitable relief. The state court plaintiff, after all, is the *desideratum* of the offending state proceeding. The action is brought at plaintiff's behest and can be terminated at plaintiff's behest. Furthermore, when the state court proceeding is challenged in federal court, not only is the state court plaintiff an adequate federal defendant, but the preferred defendant. The state court plaintiff is, for all practical purposes, the real party in interest and is best situated to argue the merits of the PKPA challenge.

Nor are the normal fears that arise in extending section 1983 to private litigants raised. The PKPA claimant is seeking, and can be limited to, equitable relief against the state court proceeding.[393] The mere issuance of a declaratory judgment on the simple question of PKPA interpretation is probably adequate. The PKPA defendant will not be subject to the economic burden and risks posed by a damages action—the same burdens and risks that have prompted a cautious approach to expansion of the color of state law requirement.[394] In determining whether to grant section 1983 relief, it is noteworthy that the Court has often drawn distinctions based on the nature of the relief sought: equitable relief does not raise the same concerns raised by monetary relief, and may justify the relaxation of remedial standards.[395]

Recommended, then, is a more pragmatic application of section 1983's "color" requirement. Equitable liability of the state court litigant will best capture the realities of PKPA challenges, and will avoid the less seemly necessity of suing a member of the state judiciary. If judicial precedent does not easily lend its support to this approach, it may be that such precedent is not truly apposite to the problem of PKPA enforcement.

There remains one final consideration in determinining whether a section 1983 remedy is to be given its literal application in enforcing the PKPA. Even if it can be

---

390. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982).

391. *See* cases cited *supra* note 381; *see also* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1147 (2d Cir. 1986), *rev'd on other grounds*, 107 S. Ct. 1519 (1987).

392. *See id.* (Where a party merely seeks a judicial ruling, "the independent judgment of the state judiciary is called into play, and unless unusual circumstances are shown . . . a private party cannot be charged with responsibility for a judicial decision.").

393. This is the extent of relief provided by those federal courts that have entertained actions to enforce the PKPA. *See* cases cited *supra* note 24.

394. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 952–53 (1982) (Powell, J., dissenting) (distinguishes prior § 1983 decisions on the ground that no *damages* were sought).

395. *See, e.g., id.*; Dennis v. Sparks, 449 U.S. 24, 31 (1980) (collateral appearance of state judge as witness in federal action "is not of the same . . . magnitude as the prospects of being a defendant in a damages action"); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19–20 (1979) (recognizing implied equitable remedy under federal law but denying monetary remedy); Edelman v. Jordan, 415 U.S. 651 (1974) (recognizing the availability of § 1983 equitable relief against the state but denying monetary relief).

said that a PKPA violation constitutes a paradigmatic example of federal law violation under color of state law, the section 1983 remedy might still be precluded by indications of contrary congressional intent in the PKPA itself. More specifically, invocation of section 1983 to enforce the PKPA could be precluded if (1) the PKPA fails to create enforceable rights,[396] or (2) assuming the existence of rights, the PKPA preempts use of section 1983 to enforce them.[397]

The claim that the PKPA creates no enforceable rights is easily dismissed. As discussed above, judicial practice in enforcing cognate provisions of the full faith and credit statute confirms that PKPA protection can, and perhaps must be, invoked by the custodial claimant on such claimant's own behalf.[398] PKPA protection, then, operates as a procedural right of the claimant. Furthermore, the Court has demonstrated a consistent willingness to find statutory rights enforceable under section 1983 when the statute speaks in prohibitory terms, when its language is mandatory rather than precatory, and when it clearly is intended to benefit a class inclusive of the particular plaintiff.[399] Beyond quibble, the PKPA sets forth a mandatory prohibition of certain state court actions. And, other than the disputed children themselves, one can imagine no group more benefited by the PKPA than parents and other child custodians.[400]

More troublesome is the question whether the PKPA precludes use of section 1983 to enforce the rights it creates. Several federal courts have indicated that the PKPA rights are to be asserted defensively in the allegedly offensive court action, which is, in fact, the conventional means of asserting defenses based on the preclusive effect of prior judicial proceedings.[401]

The Court has had several recent opportunities to examine challenges to the section 1983 remedy when used to enforce statutory rights. Most recently, the Court noted in *Wright v. City of Roanoke Redevelopment and Housing Authority*[402] that

> if there is a state deprivation of a 'right' secured by a federal statute, Section 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement. 'We do not lightly conclude that Congress intended to preclude reliance on Section 1983 as a remedy' for the deprivation of a federally secured right.[403]

Somewhat more specifically, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[404] the Court stated, "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to

396. *See* Wright v. City of Roanoke Redevelopment & Hous. Auth., 107 S. Ct. 766, 770–71 (1987).

397. *See id.*

398. *See supra* text accompanying notes 90–94.

399. *See* Wright v. City of Roanoke Redevelopment & Hous. Auth., 107 S. Ct. 766, 775 (1987) (O'Connor, J., dissenting); *see also* Smith v. Robinson, 468 U.S. 992, 997 n.4, 1002 n.6 (1984); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18 (1981); Maine v. Thiboutot, 448 U.S. 1 (1980).

400. *See supra* text accompanying notes 90–96.

401. *See supra* notes 57–59 and accompanying text.

402. 107 S. Ct. 766 (1987) (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

403. *Id.* at 771.

404. 453 U.S. 1 (1981).

demonstrate congressional intent to preclude the remedy of suits under Section 1983."[405]

Taken at face value, the language in *Sea Clammers* is plainly not satisfied in the case of the PKPA, since the PKPA provides no alternative remedial devices that can be said to preempt section 1983. But this result leads to a striking incongruity in the instance of the PKPA. If one agrees that the PKPA and its legislative history fail to satisfy the *Cort v. Ash* test,[406] under which an implied cause of action might be found, can one simultaneously conclude that the same statute and legislative history *permit* invocation of the section 1983 remedy? After all, an implied cause of action under the PKPA and a section 1983 remedy address—and only address—the identical situation of state court action in violation of another court's custodial authority. Can one credibly argue that Congress rejected a remedy for the PKPA unless it was styled "section 1983" relief?

This incongruity can be diminished, if not altogether dispelled, if one focuses upon the purposes of the divergent interpretive exercises called for by the *Cort v. Ash* and *Sea Clammers* tests. As Professor Sunstein has observed, the *Cort* inquiry is overshadowed by separation-of-powers concerns.[407] When courts infer private causes of action they do so at the risk of frustrating congressional intent (discernible or not), and they approach the constitutionally suspect territory of judicial legislation.[408] In light of these attendant concerns, courts will be especially cautious when congressional intent to create a private remedy is not fairly apparent.

Quite the opposite concerns attend application of the *Sea Clammers* test. In section 1983, Congress has expressly exercised its fourteenth amendment legislative powers to create remedies against unlawful state action.[409] Furthermore, the Supreme Court has not equivocated in its views that section 1983 authorizes relief against state action in violation of statutory as well as constitutional provisions.[410] Therefore, those who would find an implied repeal of section 1983 under the PKPA must carry a burden even greater than that of implied rights proponents: whereas implied rights proponents argue against a congressional background of legislative silence, proponents of an implied repeal of section 1983 must upset the *literal* directive of Congress.[411]

---

405. *Id.* at 20.

406. *See supra* text accompanying notes 68–163.

407. *See* Sunstein, *supra* note 72, at 413–15 (1982).

408. *See id.* at 413 ("Judicial creation of private enforcement rights has increasingly been regarded as a form of lawmaking, and the additional remedy may conflict with the legislature's conception of the right it created.") The soundness of this view is questioned in Wartelle & Louden, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 536–38 (1982).

409. *See generally* Sunstein, *supra* note 72, at 396–411.

410. *See, e.g.*, cases cited *supra* note 399.

411. *See* Sunstein, *supra* note 72, at 420–21 ("A fairly powerful showing of contrary legislative intent might therefore be required to support the conclusion that the section 1983 remedy has been extinquished by the creation of a particular regulatory scheme."). A similar view has been expressed by Justice Stevens (and, as *Wright v. City of Roanoke Redevelopment* & Hous. Auth., 107 S. Ct. 766 (1987) illustrates, has probably prevailed):

> Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable any time a violation of a federal statute is alleged . . . the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983.

While there is appreciable support for the view that Congress never contemplated the use of section 1983 to remedy PKPA violations,[412] this support seems insufficient to impliedly repeal the literal applicability of section 1983. Prior Court decisions have required either an express exclusion of the 1983 remedy,[413] or an alternative federal remedy "sufficiently comprehensive" to justify inference of repeal.[414] Each is lacking in the instance of the PKPA.

An even more cogent reason for refusing to infer congressional intent to repeal section 1983 *pro tanto* has been stated by Professor Sunstein:

> The legislative intent that is relevant for purposes of the section 1983 inquiry is not only that of the Congress that enacted the governing substantive statute [the PKPA], but—when that Congress has not spoken—the intent of the Congress that enacted section 1983 as well. The 1874 Congress accorded to private persons a federal judicial remedy against state officials who have violated federal law. That intent, embodied as it is in law, must be respected unless a subsequent Congress has at least in some sense faced this issue and decided otherwise.[415]

It is difficult to conclude that Congress has "faced the issue" of section 1983's use to enforce the PKPA. Instead, the history of the PKPA is void of reference to the issue. In this void, section 1983 and the intent of the Reconstruction Congress should operate unimpaired, even if the PKPA's history fails to support an implied remedy under the substantive statute itself. Furthermore, it is worth mention that some federal courts *have* found authorization for an implied PKPA remedy in the PKPA.[416] This position, though in error, lends added conviction to the presumption against implied repeal of a statutory remedy that is express and unequivocal.

B. *Comity Restraint Under* Younger v. Harris

The attempted use of section 1983 to enjoin state court proceedings in violation of federal law is by no means unprecedented. Such use has, in fact, inaugurated an entire branch of federalism identified with its seminal case pronouncement in *Younger v. Harris*.[417] Under *Younger* and its progeny, pending state criminal proceedings in violation of federal law—proceedings, for example, that are directed

---

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 27 n.11 (1981) (Stevens, J., dissenting).

412. *See supra* text accompanying notes 160–63. As Professor Sunstein has observed, "[I]n almost all cases there will be virtually no evidence of such intent." Sunstein, *supra* note 72, at 418.

413. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1970) (statement of statute's floor manager in Congress demonstrated express intention to prohibit § 1983 remedy).

414. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19–21 (1981).

415. Sunstein, *supra* note 72 at 425. It could be argued, of course, that the PKPA's potential threat to the independence of the state judiciary implies congressional repeal of § 1983 to enforce the PKPA. Yet, this result seems inconsistent with the fact that *Mitchum* has already considered, and rejected, the contention that Congress did not intend § 1983's use to regulate state judicial proceedings. *See supra* text accompanying notes 370–73. Moreover, the PKPA's legislative history is silent as to what federal corrective mechanism, if any, is available to remedy state court violations of the Act. *See supra* text accompanying notes 160–63. Therefore, the best evidence of legislative intent concerning either the 1980 Congress or the 1874 Congress is that the latter was unhesitant to recognize a federal court corrective role for state court violations of federal law.

416. *See supra* note 104.

417. 401 U.S. 37 (1971). *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 291–321 (1980) [hereinafter REDISH].

against protected free speech activity, or proceedings that violate constitutionally protected evidentiary rights—cannot be the subject of section 1983 actions for declaratory or injunctive relief.[418] Fundamental to the *Younger* doctrine are both the fear that federal equitable relief will disrupt state judicial processes, and the conviction that state courts can adequately protect the federal rights of state court litigants.[419]

One is hard pressed to offer a straight-faced reconciliation of *Younger* and *Mitchum*, since *Mitchum* recognized a section 1983 exception to the Anti-Injunction Act precisely because of the perceived fear that state courts can be used to effect constitutional violations, and the belief that such proceedings *should* be disrupted.[420] Nonetheless, *Younger*'s federalism protections have not only been repeatedly affirmed by the Court, they have been extended to several forms of state civil proceedings.[421] It is necessary, therefore, to give preliminary consideration to *Younger*'s potential application when federal litigants seek to enjoin state custody proceedings under the PKPA.

Much of the *Younger* precedent can be distinguished based on the absence of a governmental litigant in routine state custody proceedings. In most post-*Younger* cases involving state civil proceedings, the state or its agencies have been parties to the challenged proceeding.[422] But involvement of the state as litigant is not a requirement under the evolving *Younger* doctrine, as is evidenced by the Court's 1987 decision in *Pennzoil Co. v. Texaco, Inc.*.[423] Required under *Pennzoil* is a "vital" or "important" state interest, which may be found even when, as in *Pennzoil*, the state litigation occurs between private parties.[424]

Two important state interests are arguably implicated in child custody proceedings. The first is the interest of the state in securing the custodial welfare of children within its jurisdiction. The second interest, more a procedural than a traditionally substantive one, is that of the state in the use of its judicial processes.

Support for the view that the state has an important interest in child custody could be gleaned from *Moore v. Sims*.[425] In *Moore*, the Court invoked *Younger* abstention to preclude federal court interference with a state proceeding brought for temporary custody of children who were the alleged victims of abuse.[426] Two obvious points of distinction, however, are: (1) that a state agency was a party to the state

418. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (injunctive relief); Samuels v. Mackell, 401 U.S. 66 (1971) (declaratory relief). *Younger* abstention also prohibits interference with state processes *after* a proceeding is completed. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 608–09 (1975).

419. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 43–44 (1971).

420. *See* REDISH, supra note 417, at 274.

421. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Juidice v. Vail, 430 U.S. 327 (1977).

422. Such is true of all the cases cited in note 415 with the exception of *Pennzoil*. *See also* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986); Trainor v. Hernandez, 431 U.S. 434 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). All these cases similarly involved litigation in which the state or its agencies were parties.

423. 107 S. Ct. 1519 (1987).

424. *Id.* at 1527.

425. 442 U.S. 415 (1979).

426. *See id.* at 419–22.

proceeding in *Moore*; and (2) that the state proceeding to prevent child abuse was "in aid of and closely related to [state] criminal statutes."[427] By comparison, custodial disputes that typically arise under the PKPA are private civil conflicts, albeit important ones to the disputants.

There is argument, however, for extending *Moore* to the situation of private custody disputes. As discussed earlier in this Article, child custody disputes are a subject left traditionally for resolution by the states.[428] In addition, concerns with child abuse and child kidnapping—the type of concerns that *Moore* found sufficient to create an important state interest—may occasionally arise in child custody litigation notwithstanding the private nature of such litigation.[429] Particularly given the court's continual discovery of somewhat ephemeral state interests, one cannot predict with great confidence just how far *Younger* and *Moore* may be extended in future cases.

Yet, an extension of *Moore* to PKPA controversies would seem too ambitious. First, PKPA suits do not thrust courts into substantive child custody disputes; the PKPA suit addresses a discrete jurisdictional problem that rarely implicates the traditional domestic relations restriction on federal court authority.[430] Second, the fact that allegations of child abuse are alleged in the state court custody proceeding is irrelevant to the issue of the state court's violation of the PKPA's jurisdictional proscriptions: the PKPA provides that custodial disputes, even those involving claims of child abuse, are to be resolved in a single, specified court.[431] Finally, the PKPA does not interfere wth the state's own authority to act in the child's best interests, and such state action would be immune from federal court interference under *Moore*. As a consequence, the limited section 1983 action to enforce the PKPA does not compromise any of the state's concerns protected under *Moore*.

A second state interest recognized under the *Younger* doctrine, and confirmed recently in *Pennzoil*,[432] is that of the state in its judicial processes. Thus, in *Juidice v. Vail*,[433] the Court invoked *Younger* to preclude federal interference with state civil contempt proceedings that had arisen when a private litigant sought to enforce his default judgment. In the celebrated case of *Pennzoil*, the *Younger* doctrine was invoked to preclude federal court interference with state procedures for enforcement of a civil judgment pending appeal.[434]

---

427. *Id.* at 423. In *Moore*, the Texas Department of Human Resources instituted a civil action for protective custody of allegedly abused children. *See id.* at 419–20. The Court specifically noted the interrelationship between the custody action and state criminal law enforcement. *See id.* at 423.

428. *See supra* text accompanying note 34.

429. *See, e.g.*, Thompson v. Thompson, 798 F.2d 1547, 1559 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (allegations of child abuse). *See also* 28 U.S.C. § 1738A(c)(2)(C) (1982) (authorizing state courts to exercise emergency jurisdiction where a child has been abandoned, mistreated, or abused).

430. *See supra* text accompanying notes 128–37.

431. Even that provision of the PKPA authorizing state court action in instances of child abuse is limited to situations where emergency action is needed to literally "protect" a child. *See* 28 U.S.C. § 1738A(c)(2)(C) (1982). As indicated above, this emergency provision is intended for "rare" use. *See supra* note 137; and significantly, none of the reported federal cases involves this jurisdictional ground. Moreover, if *Moore*-type concerns do arise in custody litigation under the PKPA, the federal court *could* invoke abstention in that limited situation.

432. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987).

433. 430 U.S. 327 (1977).

434. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1522–25 (1987). In *Pennzoil*, Texaco challenged the

Pennzoil, however, contains explanatory language that suggests its inapplicability to the properly asserted PKPA claim. Explaining its decisions in *Juidice* and *Pennzoil*, the Court stated,

> [*Juidice*] rests on the importance to the states of enforcing the orders and judgments of the courts. . . . Both *Juidice* and this case involve *challenges to the processes by which the State compels compliance with the judgments of its courts*. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained.[435]

The *Pennzoil* rationalization would not seem implicated by challenges to state court jurisdiction under the PKPA. A PKPA suit under section 1983 is not directed generically against state processes, but instead addresses a misapplication of federal law in a particular case.[436] Nor would a properly timed section 1983 action interfere with the execution of a state judgment—relief must be sought prior to entry of a judgment.[437] Moreover, Justice Powell, writing for the majority, appeared to anticipate and negate too expansive a reading of *Pennzoil*:

> [T]he State of Texas has an interest in this proceeding 'that goes beyond its interest as adjudicator of wholly private disputes.' . . . Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice*, we rely on the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'[438]

Extension of the judicial process rationale of *Pennzoil* to wholly private disputes not yet decided would all but overrule *Mitchum*, and its forceful affirmation of section 1983's role in policing state courts. The *Younger* doctrine has already eviscerated the use of *Mitchum* to enjoin criminal and quasi-criminal proceedings—proceedings where, incidentally, the bulk of federal law protections apply.[439] What utility *Mitchum* retains arises in civil proceedings. If the Court intends to further limit *Mitchum*'s use in civil proceedings based on a state's vague interest in judicial process, it should do so with a straightforward reversal of *Mitchum*. For at least in a straightforward assault on *Mitchum*, the Court can temerously overturn the strong civil rights homily in *Mitchum* and restore its decisions to a place of literal integrity. Otherwise, the persistent contraction of *Mitchum* through the discovery of important state interests will come to symbolize a form of Supreme Court doublespeak stretching the bounds of credulity.

---

constitutionality of a Texas law requiring that it post a supercedeas bond for the amount of the judgment against it—which exceeded $11 billion—in order to avoid execution of the judgment pending appeal.

435. *Id.* at 1527.

436. Indeed, the PKPA expressly incorporates the provisions of state jurisdictional law into its standards. *See supra* text accompanying notes 46–49.

437. *See supra* text accompanying note 347.

438. Pennzoil Co. v. Texaco, Inc.,107 S. Ct. 1519, 1527 n.12 (1987).

439. *See* U.S. CONST. amends. IV–VI, VIII.

C. *Equitable Restraint in the Enforcement of the PKPA*

The *Younger* doctrine represents an unprecedented—and some would say aberrational—melding of federalism and equity principles.[440] In its typical operation, *Younger* treats criminal and other important state civil cases categorically and forbids virtually all federal court interference with them. This is the aspect of *Younger* that the Court identifies by the epithet, "Our Federalism."[441] The *Younger* doctrine also preserves an element of traditional equitable doctrine. In the *Younger* context, equity traditionally provides a failsafe mechanism permitting the federal courts to preclude state court proceedings that result from patent bad faith on the part of the state, or that occur pursuant to an egregiously unconstitutional state law.[442] This equity exception has proven a virtual dead letter in the operation of *Younger*.

The diminution of equitable principles under *Younger* is singularly disappointing, for equitable doctrine could be fashioned by the courts to accommodate both the mandate of section 1983 and the cautions of federalism and comity. That is, in lieu of wholesale preclusion of federal relief under *Younger*, the courts could recognize the presumptive availability of section 1983 relief against offending state courts, reserving their grant of such relief for the situation where its need is compelling. The essential difference between operation of the *Younger* doctrine and equitable doctrine would be this: equitable restraint would accord due respect for the ability of *federal courts* to act responsibly and prudentially in overseeing the functioning of state courts. It is just such respect for the supervisory role of the lower federal courts that has been disparaged by *Younger*, with its presumption that federal courts will act to disrupt and demean state courts in the absence of *Younger*'s strong proscription.

If, as we have contended, *Younger* has no literal application to state civil litigation in violation of the PKPA, there is opportunity to revitalize equitable doctrine so as to promote *Younger*-related federalism concerns while avoiding the extreme restrictions that *Younger* places on federal court power. Drawing upon analogous precedent under the Anti-Injunction Act, the federal courts could lessen the tension that the antinomy of *Younger* and *Mitchum* produces.

The Anti-Injunction Act contains an express exception authorizing federal courts to enjoin state court proceedings where necessary "to protect or effectuate" federal judgments.[443] This exception, often referred to as the "relitigation exception,"[444] is not subject to the *Younger* restrictions. Yet, many federal courts have summoned

---

440. Professor Owen Fiss, for example, has observed that equitable limits on federal court power have historically required consideration of alternative *federal* remedies, rather than the possibility that federal rights might be safeguarded in state court. *See* Fiss, Dombrowski, 86 YALE L.J. 1103, 1107 (1977); *see also* Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 611 (1975).

441. Younger v. Harris, 401 U.S. 37, 44 (1971).

442. *See id.* at 53. For a discussion of the Court's limited view of the equitable exception in *Younger*, and the "enormous" evidentiary problems in qualifying for the exception, see Fiss, Dombrowski, 86 YALE L.J. 1103, 1115–16 (1977); Sedler, Dombrowski *in the Wake of* Younger*: The View from Without and Within*, 1972 WIS. L. REV. 1, 29–40.

443. 28 U.S.C. § 2283 provides in pertinent part: "A court of the United States may not grant an injunction to stay proceedings in a State court except . . . to protect or effectuate its judgments." 28 U.S.C. § 2283 (1982) It now seems well established that state courts must accord the same preclusive effect to federal court judgments that the federal courts would themselves accord. *See generally* 18 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, § 4468.

444. *See* REDISH, *supra* note 417 at 262–65.

traditional equitable principles to impose self-restraint on their granting of relief. These courts regularly balance the alleged need for federal intervention against the availability of alternative remedies—primarily the assertion of an affirmative defense in the offending state court proceeding itself.

Although the commentators are in some disagreement over the point,[445] most federal courts appear ready to decline exercise of their equitable powers absent a strong showing that the state courts cannot or will not provide adequate relief to the federal claimant.[446] For example, federal relief is most often granted when the state court plaintiff has previously subjected the opposing party to expensive and burdensome litigation in federal court,[447] when the state court plaintiff has commenced a multiplicity of law suits against the opponent,[448] or when the state court plaintiff has brought an action clearly foreclosed by an earlier federal judgment.[449] These attempts to relitigate an earlier federal dispute are viewed as vexatious, bad faith behavior justifying immediate federal relief;[450] and federal relief implies not that the state courts will be disrespectful of the earlier federal judgment, but that the federal judiciary must take exceptional, forceful action to restrain the state court plaintiff.

---

445. The commentary would suggest two conclusions about the invocation of federal relief under the "relitigation exception": (1) federal courts do not normally require, as a condition of relief, that the federal claimant have first attempted to plead preclusion in the offending state court action; *see id.* at 263 n.31; and (2) federal courts have often enjoined automatically state court proceedings without requiring that the federal claimant satisfy traditional equitable requirements. *See* Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 486 (1965); *accord* 17 FEDERAL PRACTICE AND PROCEDURE, *supra* note 7, at 348.

A closer scrutiny of the relitigation precedent, however, contradicts the view that seemingly prevails. As suggested in the following discussion, the great majority of cases involve *one or more* of the following equitable justifications for federal relief: the state court has refused to accord proper preclusive effect to a federal judgment; the state court plaintiff has commenced bad faith, vexatious litigation; or the state court defendant has previously been subjected to burdensome, costly litigation. Thus, in contrast to the view of most commentators, we suggest that federal courts have demonstrated marked caution before interfering with state court litigation.

446. *See, e.g.*, Delta Air Lines v. McCoy Restaurants, Inc., 708 F.2d 582, 585 (11th Cir. 1983); Silcox v. United Trucking Serv., 687 F.2d 848, 850 (6th Cir. 1982); Regional Properties Inc. v. Financial & Real Estate Consulting Co., 678 F.2d 552, 566 (5th Cir. 1982); Southern Calif. Petro. Corp. v. Harper, 273 F.2d 715, 719 (5th Cir. 1960). *But see* Hunt v. Mobil Oil Corp., 557 F. Supp. 368, 372 (S.D.N.Y. 1983).

447. *See, e.g.*, BGW Assoc. v. Valley Broadcasting Co., 532 F. Supp. 1115, 1117 (S.D.N.Y. 1982); Browning Debenture Holders' Comm. v. DASA Corp., 454 F. Supp. 88, 99–100 (S.D.N.Y. 1978).

448. *See, e.g.*, *In re* Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1335 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); International Ass'n of Mach. & Aerospace Workers v. Nix, 512 F.2d 125, 128 (5th Cir. 1975); Jackson v. Carter Oil Co., 179 F.2d 524 (10th Cir. 1950), *cert. denied*, 340 U.S. 812 (1950); Stegeman v. Detroit Mortgage & Realty Co., 541 F. Supp. 1318, 1323–24 (E.D. Mich. 1982); Baker v. Gotz, 415 F. Supp. 1243, 1251 (D. Del. 1976); Walter E. Heller & Co. v. Cox, 379 F. Supp. 299, 309 n.37 (S.D.N.Y. 1974).

449. *See, e.g.*, Southwest Airlines v. Texas Int'l Airlines, 546 F.2d 84, 91 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); Doe v. Ceci, 517 F.2d 1203, 1206 (7th Cir. 1975); Chrysler Corp. v. E.L. Jones Dodge, Inc., 421 F. Supp. 969, 972 (W.D. Pa. 1976). *See also* Delta Air Lines v. McCoy Restaurants, Inc., 708 F.2d 582, 585 (11th Cir. 1983) (failure to make clear showing of relitigation); Regional Properties Inc. v. Financial & Real Estate Consulting Co., 678 F.2d 552, 566 (5th Cir. 1982) (failure to make clear showing of relitigation).

450. *See, e.g.*, *In re* Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1335 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982) (harassment); Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980) (harassment); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45, 49–50 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (harassment); Scott v. Hunt Oil Co., 398 F.2d 810 (5th Cir. 1968) (harassment); Stegeman v. Detroit Mortgage & Realty Co., 541 F. Supp. 1318, 1328 (E.D. Mich. 1982); Browning Debenture Holdings' Comm. v. DASA Corp., 454 F. Supp. 88, 99–101 (S.D.N.Y. 1978); Walter E. Heller & Co. v. Cox, 379 F. Supp. 299, 309 (S.D.N.Y. 1974) (harassment). *See also* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 n.54 (D.C. Cir. 1984) (party must show "harassment, bad faith, or other equitable circumstances").

Similarly, federal relief has been thought necessary when the state court has, through inconsideration or mistake, denied appropriate preclusive effect to a prior federal judgment. Thus, state court proceedings have been enjoined when the state court has rejected preliminary efforts to abate its action on federal preclusionary grounds,[451] or when the state court has actually entered a judgment in conflict with an earlier federal judgment.[452] In these circumstances, however, the federal courts seem to require that the preclusive effect of the earlier federal judgment be fairly clear.[453]

The cases arising under the relitigation exception to the Anti-Injunction Act do not provide exact parallels to cases arising under the PKPA. The relitigation cases involve attempts to relitigate discrete, historical disputes that have become final federal judgments. Child custody disputes, by comparison, are never finally resolved, and even under the PKPA may be modified at any time that the child's best interests so dictate.[454] But the PKPA does ensure that only *one* state will exercise jurisdiction to modify, and that other states will respect a previous custody order until the state with modification jurisdiction acts. Accordingly, PKPA controversies focus on an essentially jurisdictional question, rather than on the scope and finality of prior custody orders. Notwithstanding this difference between disputes involving the PKPA and those involving the relitigation exception, similar equitable principles can be brought to bear when determining the propriety of federal court relief.

Under what circumstances, then, should federal courts enforce the PKPA through equitable relief against state court proceedings? One response is clear: federal relief cannot come too early or too late in the course of the state custody proceeding.

There is unanimous agreement among the federal courts that PKPA relief is not available until a state court wrongfully *asserts* jurisdiction over a custody dispute that is properly within the jurisdiction of another state court.[455] Not only is this result affirmed by the language of the PKPA, it is probably necessary for there to be color of state law under section 1983.[456] Thus, the mere filing of a custody action does not implicate PKPA coverage, and the putative PKPA plaintiff must first ask the state court lacking jurisdiction to halt its proceeding.

---

451. *See, e.g.*, Silcox v. United Trucking Serv., Inc., 687 F.2d 848, 849 (6th Cir. 1982); Harper Plastics, Inc. v. Amoco Chem. Corp., 657 F.2d 939, 942 (7th Cir. 1981); Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980) (state supreme court refused to decide preclusion issue); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (state court motion to dismiss pending for more than one year); Dow v. Ceci, 517 F.2d 1203, 1206 (7th Cir. 1975) (state judge issued injunction contradicting federal injunction); Chrysler Corp. v. E.L. Jones Dodge, Inc., 421 F. Supp. 969 (W.D. Pa. 1976) (state judge rejected, without opinion, preclusion challenge).

452. *See, e.g.*, Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980); South Cent. Bell Tel. Co. v. Constant, Inc., 304 F. Supp. 732 (E.D. La. 1969). These cases, of course, are subject to reexamination in the light of the Court's recent decision in *Parsons*. *See supra* text accompanying notes 289–97.

453. *See, e.g.*, Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Doe v. Ceci, 517 F.2d 1203, 1206 (7th Cir. 1975); Chrysler Corp. v. E.L. Jones Dodge, Inc., 421 F. Supp. 969, 972 (W.D. Pa. 1976).

454. *See supra* text accompanying notes 60–65.

455. *See supra* note 65.

456. *See supra* note 385 and accompaying text.

Because the PKPA violation will not ripen until the state court refuses to dismiss the wrongful custody action, much federal-state tension can be avoided by reliance on the state courts to dismiss actions improperly commenced before them. Most issues of child custody jurisdiction are not legally complex, and such statutory ambiguities as exist should eventually be resolved as the state courts gain interpretive experience under the PKPA.[457] Furthermore, some of the more egregious child kidnapping practices that prompted enactment of the PKPA are easily soluble under PKPA and should leave little opportunity for quibble in the state courts.[458]

At the other end of the temporal spectrum are PKPA actions filed too late in the history of state proceedings. The Supreme Court has made clear that normal full faith and credit principles apply even when a state proceeding threatens to undermine the jurisdiction and judgments of federal courts. As the Court recently stated in *Parsons Steel, Inc. v. First Alabama Bank*,[459] parties who proceed to final judgment in state court must abide by the state court's ruling on jurisdictional and preclusive issues, just as they must abide by the state court's substantive rulings.[460]

Parsons would indicate, then, that the custodial litigant who fails to terminate state proceedings through a preliminary challenge in the state court should seek federal relief promptly. If the litigant chooses, instead, to litigate the underlying substantive issue of custody, and loses, the custodial judgment may be correctable only through appeal to a higher state court.[461] The timing of the request for federal relief is accordingly crucial.

Assuming the PKPA claimant is neither premature nor dilatory in seeking federal relief, what circumstances would justify the granting of a declaratory judgment or an injunction? The strongest claim for equitable relief would arise when the party commencing the state action has obtained or retained custody of a child without any claim of lawful authority. This scenario could arise, for example, when the party in custody has seized the child without pretense of authority under a custody order, or when that party has refused to surrender the child in accordance with the terms of a custody order.[462] In such circumstances, the claim to federal equitable relief is particularly compelling, since the PKPA was especially directed against unlawful child snatching[463] and since the party asserting wrongful custody has exhibited plain contempt for orderly judicial processes.

---

457. *See infra* notes 482–85 and accompanying text. The reported decisions indicate that *factual* disputes are common in controversies over the application of the PKPA. These cases would not seem particularly well suited for federal equitable relief, since there will be no clear PKPA violation justifying federal court action.

458. As indicated above, most PKPA jurisdictional questions can be settled by reference to the "home state" criterion. This criterion should foreclose attempts to kidnap children and quickly establish jurisdiction in another state, since the "home state" residence requirement makes provision for situations where a child is absent from his home state "because of his removal or retention by a contestant." *See* 28 U.S.C. § 1738A(c)(2) (1982).

459. 474 U.S. 518 (1986).

460. *See supra* text accompanying notes 289–96.

461. *See id.*

462. *See, e.g.*, Hooks v. Hooks, 771 F.2d 935, 938–39 (6th Cir. 1985); Lloyd v. Loeffler, 694 F.2d 489, 490 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039, 1040–41 (D.C. Cir. 1982). *Compare* McDougald v. Jenson, 786 F.2d 1465, 1468–70 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (child seized in reliance on state court order) with DiRuggiero v. Rodgers, 743 F.2d 1009, 1011–13 (3d Cir. 1984).

463. *See supra* note 35.

A second situation justifying federal equitable relief is where the state litigant has engaged in a pattern of multiple, vexatious custody challenges.[464] A party's weaker economic status can be practically determinative of the party's ability to engage in custody litigation,[465] and the opponent who exploits that status should be halted in such efforts. In addition, repetitive custody litigation cannot help but erode the emotional stability of the child-custodian relationship.[466] For these reasons, federal equitable relief against the litigious claimant may be appropriate against both present and *future* custody proceedings.[467]

A third situation justifying federal relief will arise when a litigant invokes state court jurisdiction that is clearly violative of federal law.[468] Of course, the state court itself presumably will terminate its own proceeding when its unlawfulness is patent. Cases under the relitigation exception reveal, however, that state courts will occasionally proceed in the face of plain federal error.[469] Federal equitable relief in such uncommon situations should be available.

The summary above is not exhaustive. Over time the federal courts can identify other circumstances that will justify equitable relief against state proceedings, for it is the nature of equity to be malleable and situationally responsive. But, heeding the command of *Pulliam*,[470] federal equitable relief should be the exception more than the rule, and relief will probably not be available in the typically disputed cases under the PKPA. These cases usually do not involve blatantly lawless kidnapping, intentionally vexatious litigation, or patently unlawful assertions of jurisdiction.[471] Instead, these cases are characterized by rather complicated factual-legal conten-

---

464. *See* DiRuggiero v. Rodgers, 743 F.2d 1009, 1011 (3d Cir. 1984) (allegation that non-custodial parent "had made applications in [court] to regain custody 'every other month'" and that custodial parent found it "financially impossible" to continue with litigation).

465. *See* Amicus Curiae Brief of Women's Legal Defense Fund and Parents Without Partners at 10, Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987). The Amicus Brief cites telling statistics concerning the economic disparities between women and men following divorce. Based on this disparity, the brief argues for an unlimited right to seek federal court resolution of custodial impasses. On reflection, one must conclude that even a wholesale federal corrective remedy will not be sufficient to right the imbalance between male and female custodial litigants. After all, the request for federal relief will follow prior litigation in state courts, thus ensuring that each custodial claimant will have incurred litigatory costs for a minimum of two proceedings. A better response to this problem would be recognition of the right to *recover* litigation costs incident to custodial proceedings. Not only would this help to rectify economic disparities in custodial contests, but it would probably deter such contests. In any event, the equitable remedy proposed in this Article would empower a court to enjoin a custodial claimant who has demonstrated an intent to exploit his opponent through bad faith, repetitive litigation.

466. *See supra* note 35.

467. *See, e.g.*, Seaboard Coast Line R.R. v. Union Camp Corp., 613 F.2d 604 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980); Stegeman v. Detroit Mortgage & Realty Co., 541 F. Supp. 1318 (E.D. Mich. 1982). Equitable relief against future proceedings raises two concerns in PKPA litigation. First, recognition of § 1983 relief against the *private party* will be necessary, since relief against a particular state court will be limited by the confines of the particular lawsuit. *See supra* text accompanying notes 378–95. Second, equitable relief concerning future proceedings must necessarily reserve the opportunity for the enjoined party to return to federal court and request suspension of the injunction (or declaratory relief, as the case may be), since the PKPA contemplates that custodial jurisdiction may change over time. *See supra* text accompanying notes 60–65.

468. *See* Wyman v. Lamer, 624 F. Supp. 240 (S.D. Ind. 1985). Based on the recital of facts by the court in *Wyman*, it seems indisputable that the federal plaintiff was relying on the custody order of the "home state," and that the conflicting order lacked any jurisdictional foundation under the PKPA. *See id.* at 242–45. Nonetheless, the court lacking jurisdiction entered a custody decree.

469. *See* cases cited *supra* notes 450–51.

470. *See supra* text accompanying notes 376–77.

471. Possible exceptions to this generalization exist. *See* cases cited *supra* notes 462–66.

tions,[472] or by legal questions that as yet lack definitive resolution.[473] Such disputes will often entail related state law questions,[474] where either party may have good faith support for his or her jurisdictional claim.

It is these cases that should normally be left for state court resolution. For, unlike the proscriptions of full faith and credit, the PKPA recognizes that multiple courts may, over the course of time and changed circumstances, adjudicate the same custodial conflict.[475] There will never be true finality to the custodial decision of a court. The purpose of the PKPA is to establish the ground rules for interstate reconsideration of custody decisions; and, within the detailed provisions of the PKPA and the state law it incorporates, there is sometimes room for legitimate disagreement.[476] It is only when the disagreement lacks colorable basis, or when one litigant's behavior requires equitable sanction, that the lower federal courts should intervene.

This measured degree of federal court oversight will inevitably disappoint those who seek in the PKPA a comprehensive federal solution. The proposed federal role will, in some cases, fail to provide the desired degree of *finality*.[477] Interstate jurisdictional impasses will sometimes arise and, given the highly remote possibility of Supreme Court review,[478] the supreme command of federal law will lack a supreme enforcer.

Yet, the infrequent occurrence of impasse may offer a distorted impression of what is usually a properly functioning scheme of federal regulation. If the reported decisions are any indication, the state trial and appellate courts have demonstrated an impressive willingness to refuse jurisdiction in situations governed by the PKPA.[479]

---

472. *See, e.g.*, Thompson v. Thompson, 798 F.2d 1547, 1548–49 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987) (whether initial custody court intended to retain jurisdiction over dispute); Flood v. Braaten, 727 F.2d 303, 306 n.9 (3d Cir. 1984) (determination of "home state"); Martinez v. Reed, 623 F. Supp. 1050, 1054–56 (E.D. La. 1985) (determination of "home state"); Templeton v. Witham, 595 F. Supp. 770, 773–76 (S.D. Cal. 1984) (determination of "continuing jurisdiction" and "home state"), *vacated*, 805 F.2d 1039 (9th Cir. 1986).

473. *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 687 (D.C. Cir. 1987) (issue, *inter alia*, of legal meaning of "home state" where adoptive parents transport child shortly after birth); McDougald v. Jenson, 786 F.2d 1465, 1483–84 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (meaning of "residence"); DiRuggiero v. Rodgers, 743 F.2d 1009, 1016–17 (3d Cir. 1984) (meaning of "commencement" and "proceedings").

474. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465, 1481–84 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987) (mixed federal and state issues); DiRuggiero v. Rodgers, 743 F.2d 1009, 1016–17 (3d Cir. 1984) (mixed federal and state issues); Davis v. Davis, 638 F. Supp. 862, 864–65 (N.D. Ill. 1986) (mixed federal and state issues).

475. *See supra* text accompanying notes 60–65.

476. In this respect, the PKPA mirrors the underlying human drama involved in custody litigation—there sometimes is no indisputably correct decision and a court's resolution of the conflict cannot work full justice for all the involved parties.

477. While we must concede that the proposed remedy lacks the finality desired by some litigants, two qualifying comments are apposite. First, custody disputes, unlike conventional litigation, never can be "finally" resolved during the nonage of a child. *See supra* text accompanying notes 60–65. Second, where two courts proceed to true "impasse," the Supreme Court *has* provided an answer: The decision of the last court to address the jurisdictional issue is paramount. Under the "last-in-time" rule, the decision of the second court should normally take precedence if not corrected on appeal. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66, 74–78 (1939) ("The power of [the second court] to examine into the jurisdiction of [the first court] is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court. One trial of an issue is enough."). *Id.* at 78. *See generally* Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

478. *See supra* note 6.

479. *See, e.g.*, Ray v. Ray, 494 So. 2d 634 (Ala. Civ. App. 1986); Matter of Appeal in Pima County, 147 Ariz. 584, 712 P.2d 431 (1986); *In re* Marriage of Pedowitz, 179 Cal. App. 3d 992, 225 Cal. Rptr. 186 (1986); Ziegler v. Ziegler, 107 Idaho 527, 691 P.2d 773 (1984); Snider v. Snider, 474 So. 2d 1374 (La. App. 1985); Schoeberlein v.

Provincialism does not reign and, to the contrary, state courts have frequently declined jurisdiction as a matter of discretion even though not literally constrained by the PKPA.[480] Furthermore, the reported cases demonstrate that state judges are sensitive to the need for judicial comity, as revealed by the numerous instances of inter-court communications through which the courts have strived for informal resolution of jurisdictional disputes.[481]

It also bears reemphasis that the typical PKPA dispute is not one calling for federal court expertise in interpreting complex federal law. Factual disputes and state law jurisdictional questions abound in these cases.[482] Indeed, state jurisdictional law is expressly incorporated into the PKPA,[483] and the PKPA itself is patterned after uniform child custody jurisdiction acts.[484] This does not, of course, revive the worn objection that state courts have a special domestic relations expertise in PKPA litigation; but it does recognize that, over time, state courts will acquire more extensive experience in applying the PKPA and its cognate provisions in the uniform acts. The finality of a federal court decision, consequently, does not promise a superior jurisprudence. To the contrary, it is altogether possible that the price for federal court finality would be increased risk of interpretive error.

Therefore, the proposed use of the section 1983 remedy is a temperate solution that entails trade-offs. Only experience will tell whether the remedy adequately secures the protections that the PKPA is meant to offer, or whether Congress should recognize a more comprehensive role for the federal judiciary.[485] Still, the solution proposed avoids the twin excesses of federal court impotence under *Younger* and federal court intemperance under *Mitchum*. If nothing else, federal court enforcement of the PKPA may reestablish the fact that delicate accomodations of federal and state power are, after all, within the competence of the federal judiciary.

VIII. CONCLUSION

Federal court enforcement of the PKPA fairly bristles with federalism concerns. The avowed intention of such enforcement is to correct the decisional error of state courts, and this raises some of the more obdurate limitations on the exercise of federal equitable power. These limitations—the Anti-Injunction Act, the full faith and credit

---

Rohlfing, 383 N.W.2d 386 (Minn. App. 1986); Hempe v. Cape, 702 S.W.2d 152 (Mo. App. 1985); State *ex rel.* Valles v. Brown, 97 N.M. 327, 639 P.2d 1181 (1981); Patricia R. v. Andrew W., 121 Misc. 2d 103, 467 N.Y.S.2d 322 (1983); S. Fredrick P. v. Barbara P., 115 Misc. 2d 332, 454 N.Y.S.2d 202 (1982); Boyd v. Boyd, 653 S.W.2d 732 (Tenn. App. 1983); Rush v. Stansburg, 668 S.W.2d 690 (Tex. 1984);

480. *See, e.g.*, Stevenson v. Stevenson, 452 So. 2d 869 (Ala. Civ. App. 1984); Brown v. Brown, 195 Conn. 98, 486 A.2d 1116 (1985); Nielsen v. Nielsen, 472 So. 2d 133 (La. App. 1985); Enslein v. Enslein, 112 A.D.2d 973, 492 N.Y.S.2d 785 (1985).

481. *See, e.g.*, McDougald v. Jenson, 786 F.2d 1465, 1469 n.1 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1987); DiRuggiero v. Rodgers, 743 F.2d 1009, 1012–13 (3d Cir. 1984); *cf.* Hickey v. Baxter, 800 F.2d 430, 431 (4th Cir. 1986) (noting that the UCCJA requires communication between state courts when jurisdictional conflicts arise).

482. *See* cases *supra* notes 472, 473.

483. *See supra* note 49.

484. *See supra* note 47.

485. As Professor Coombs observed in testimony before Congress: "What should be understood is that enactment of [the PKPA] would not foreclose the process of improving the law by statutory amendment. It would only mean that any future needs for further refinement of the statutes will have to be dealt with by Congress . . . ." *See Joint Hearings, supra* note 43, at 145.

statute, and jurisdictional provisions of the Judicial Code—trace their statutory lineage to the First Congress. In collective force, these statutory restraints cast great suspicion on most lower federal court action that would intervene in the normal operation of state judicial processes.

Congress has not, however, been of one mind on these matters. With the advent of post-Civil War legislation, state courts were reconceptualized as potential federal law malefactors who should, on appropriate occasions, be regulated much like any other branch of state government. In this reconstructed scheme of federalism, section 1983 authorizes lower federal court action against state judicial processes that was never contemplated by the First Congress.

These divergent strains of congressional intent cannot coexist conceptually. Contradiction inheres in the current statutory structure of federal court power. It is not surprising, then, that the contemporary Court's enunciation of federal judicial authority is often incongruous with the resulting rococo decisional pattern.

The attempt to recognize a federal enforcement role under the PKPA is but the latest illustration of the uncertain state of federalism doctrine. It is an important illustration, however, for the problem of PKPA enforcement presents an opportunity to take a divergent path. Federalism problems need not always be worked out by the Supreme Court in grand, programmatic fashion. Instead, the Court could offer a thematic solution that recognizes the subtleties and exigencies of particular disputes. Reaffirming its customary deference to the operational integrity of state courts, the Court could nonetheless entrust the subordinate federal judiciary with the task of identifying the exceptional situation that demands a federal court response. This is a task no different from that already performed by the lower courts in habeas proceedings, and it is a task no different from that performed—though not very thoroughly—by the Supreme Court when it is asked to review state court decisions.

Recognition of a discretionary role for the lower federal courts would thus provide them with a residuum of power that is situationally responsive. The judges of these lower federal courts, one might recall, largely trace their origins to an administration that has revived an appreciation for the role of state government in our federal system. There is no cause to doubt that the subordinate federal judiciary is as capable of self-restraint as the Supreme Court. And if that judiciary occasionally strays, the same Supreme Court to which is usually entrusted the oversight of state courts can similarly correct its own.